Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

ANDREW JACKSON, WARDEN,

Petitioner

vs.

DASHAWN LYONS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

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I. Neither the United States Supreme Court nor any federal circuit has held that a lack of advice of collateral consequences of a guilty plea renders the plea involuntary. The Sixth Circuit in this case held that counsel was ineffective, not for any misadvice, but for "failing" to advise the respondent that the State could appeal the trial judge's decision whether to sentence him as a juvenile or an adult. Does this ruling constitute a "new rule" under the AEDPA, not applicable on habeas corpus; in the alternative, is the state court holding that defendant was not deprived of effective assistance an objectively unreasonable application of *Hill v. Lockhart*[1] and *Strickland v. Washington*?[2]

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[1] *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[2] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

II. The question left open by this Court's Opinion in *Williams v. Taylor*[3] is whether a state-court decision, purporting to dispose of a federal challenge on the merits but failing to articulate any reasoning or controlling federal authority, is an "adjudication" falling under the AEDPA § 2254 deferential standard of review. Should this Court address this issue inasmuch as it has led to conflicting opinions in the circuits and because the answer to the question would be outcome-determinative in this case?

III. To grant habeas corpus relief, the state court decision must have been either contrary to or an unreasonable application of settled federal constitutional principle as determined by this Court. An unreasonable application is not simply one that is erroneous or incorrect. Given the rejection of the "any rational jurist" test by this Court, should certiorari be granted to give further guidance, so that federal courts do not simply conclude that because they disagree with the state courts the state court decision was therefore unreasonable?

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[3] *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Now Comes the State of Michigan, by **Michael E. Duggan**, Prosecuting Attorney for the for the County of Wayne, **Timothy A. Baughman**, Chief of Research, Training, and Appeals, and **Thomas M. Chambers**, Assistant Prosecuting Attorney, Appeals, and prays that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals of the United States of America, entered in this case on August 8, 2002.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 221 Mich. App. 551, 562 N.W.2d 241 (1997) (*People v. Haynes, et. al.*), and is attached as an appendix. The Order of the Michigan Supreme Court denying leave to appeal is reported at 456 Mich. 945, 575 N.W.2d 561 (1998). The Opinion of the District Court is attached. The Opinion of the Sixth Circuit affirming the District Court is reported at 299 F.3d 588 (6th Cir. 2002), and is attached as an appendix. Finally, the Order denying the Petition for Rehearing En Banc, dated October 2, 2002, is attached as an appendix.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its Opinion on August 8, 2002. That Court then issued an Order denying a Petition for Rehearing En Banc on October 2, 2002.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

Respondent, date of birth 8/10/73, was charged in a criminal Information in the Detroit Recorder's Court with the offenses of first-degree premeditated murder, in violation of Michigan Compiled Laws (M.C.L.) 750.316; Michigan Statutes Annotated (M.S.A.) 28.548, an alternative count of first-degree felony murder, also in violation of M.C.L. 750.316, and possession of a firearm in the perpetration or the attempt to perpetrate a felony, in violation of M.C.L. 750.227b; M.S.A. 28.424(2).

On March 30, 1990, Respondent pled guilty as charged to the offenses with which he was charged, and Respondent did so. Because Respondent was under the age of 17 at the time of the commission of the charged offenses, the trial court set the matter for a juvenile sentencing dispositional hearing, as required by M.C.L. 769.1(3); M.S.A. 28.1072(3); Michigan Court Rule (M.C.R.) 6.931.

Following the above sentencing hearing, Judge Roberson issued a written Opinion holding that Respondent should be sentenced as a juvenile. On November 30, 1990, Respondent was sentenced as a juvenile, the Sentencing Order stating that he was to be "placed on probation and committed to a state institution or agency described in the Youth Rehabilitation Services Act, Act. No., 150 of the Public Act of 1974, MCLA 803.301, pursuant to 1988 PA 78."

Thereafter, the Wayne County Prosecutor appealed to the Michigan Court of Appeals by right Judge Roberson's decision to sentence Petitioner as a juvenile. Petitioner was appointed appellate counsel, Gerald T. Celeskey, to represent him in the Prosecutor's appeal.

On August 3, 1992, the Michigan Court of Appeals rendered a published Opinion (with Michael J. Kelly, P.J., dissenting), reversing Judge Roberson's sentencing decision and remanding the matter to the trial court for the imposition

of an adult sentence. *People v. Lyons,* 195 Mich. App. 248, 489 N.W.2d 218 (1992).

Respondent, through substitute appellate counsel, the State Appellate Defender Office, by Susan M. Meinberg, then applied for leave to appeal with the Michigan Supreme Court.

On April 23, 1993, the Michigan Supreme Court entered an Order vacating the Court of Appeals' Opinion of August 3, 1993, on the basis of ineffective assistance of Respondent's former appellate counsel; the matter was then remanded to the Michigan Court of Appeals for rebriefing. 442 Mich. 895 (1993).

On February 7, 1994, the Michigan Court of Appeals rendered a published Opinion (with Michael J. Kelly, P.J. once again dissenting), once again reversing Judge Roberson's sentencing decision and remanding the matter to the trial court of the imposition of an adult sentence. *People v Lyons (On Remand),* 203 Mich. App. 465, 513 N.W.2d 170 (1994).

Respondent, through second substitute appellate counsel, John R. Minock, then filed a Delayed Application for Leave to Appeal with the Michigan Supreme Court seeking leave to appeal the Court of Appeals' decision of February 7, 1994. On September 2, 1994, the Michigan Supreme Court denied Respondent's Application for Leave to Appeal. 447 Mich. 859 (1994).

Judge Roberson did then, on January 30, 1995, sentence Respondent as an adult to life imprisonment without possibility of parole, pursuant to M.C.L. 750.316, and as directed by the Court of Appeals' Opinion of February 7, 1994. Prior to the imposition of sentence, however, Petitioner made an oral motion to withdraw his guilty plea.

Subsequently, on April 5, 1995, Petitioner filed a written "Motion to Withdraw Guilty Plea." A date was then set for evidentiary hearing on the motion.

On April 13, 1995, an evidentiary hearing was conducted.

On October 23, 1995, Judge Roberson entered an Opinion and Order granting Petitioner's Motion to Withdraw Guilty Plea.

On November 9, 1995, the Wayne County Prosecutor filed with the Michigan Court of Appeals an Application for Leave to File an Interlocutory Appeal seeking leave to appeal Judge Roberson's Opinion and Order. On February 1, 1996, the Michigan Court of Appeals entered an Order granting the Prosecutor's Application.

On February 14, 1997, the Michigan Court of Appeals issued a published Opinion reversing the trial court's Order granting Respondent's Motion to Withdraw his Guilty Plea and affirming Respondent's conviction and sentence. *People v. Haynes (People v Lyons),* 221 Mich. App. 551, 562 N.W.2d 241 (1997).

Thereafter, Respondent, through second substitute appellate counsel, John R. Minock, sought leave from the Michigan Supreme Court to appeal the Court of Appeals' Opinion; on March 6, 1998, the Supreme Court denied leave to appeal. 456 Mich. 945, 575 N.W.2d 561 (1998) (R. 29, Michigan Supreme Court Order, Docket No. 109109, 03/06/98, p. 376).

On February 4, 1999, Respondent, through second substitute appellate counsel, John R. Minock, filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan, Southern Division.

On August 31, 2000, the District Court, the Honorable Denise Page Hood, rendered an Opinion and Order granting Respondent's Petition.

On August 8, 2002, the Sixth Circuit Court of Appeals issued an Opinion, with Judge Gilman concurring and Judge Boggs dissenting, affirming the District Court. On October 2, 2002, that Court denied the Petition for Rehearing En Banc.

Petitioner seeks certiorari.

Statement of Facts

On January 10, 1990, Respondent was arraigned on the Information charging him with first-degree premeditated murder, first-degree felony murder, and possession of a firearm in the perpetration or the attempt to perpetrate a felony. The matter was then transferred to the docket of the Honorable James A. Roberts.

On March 6, 1990, the matter was transferred to the docket of the Honorable Dalton A. Roberson on Judge Roberson's Order of that date.

On March 30, 1990, the matter convened in Judge Roberson's courtroom. Respondent's attorney indicated that Petitioner wished to tender a plea of guilty as charged to the offenses with which he was charged. Defense counsel explained as follows:

> MR. BURGESS: Larry Burgess appearing on behalf of Mr. Lyons. Judge, this is an unusual situation [;] we're about to offer a plea on the first degree murder case.
>
> This as juvenile (sic). I have discussed the matter extensively with both my client who is 16 years old and his father who is present here in the courtroom with him today.
>
> * * * *
>
> After discussing it with him judge I'm convinced that this is in the best interest that I am convinced I will be able to at the appropriate time at the disposition hearing in this matter convince this court to place Mr. Lyons into the juvenile system as opposed to the adult system and on the basis of that he

wishes to offer a plea of guilty at this time judge.

The prosecutor objected to Respondent's offering a plea of guilty to Judge Roberson:

> [MR. ROLLSTIN]: Judge the People are objecting to it. The bottom line is Mr. Lyons right now through Judge Carnovale's courtroom was blind drawn to Judge Roberts courtroom.
>
> That is where the case currently sits right now. The people are prepared to go to trial.
>
> I have all my witnesses here and the reason that Mr. Lyons is before you is quit[e] obvious in terms of offering a plea of guilty to your Honor instead of Judge Roberts. I believe that what this constitutes is a form of shopping (sic) [forum shopping] and the people are objecting to Deshawn Lyons pleading guilty to the charge before your Honor.

Judge Roberson responded as follows:

> THE COURT: You can't object to him pleading guilty, I'm the chief judge.
>
> All the cases are mine.
>
> MR. ROLLSTIN [Assistant Prosecutor]: But I think that constitutes a form of shopping (sic) [forum shopping] and we object.

THE COURT: I'll take the plea over your objection.

Judge Roberson then engaged in the following colloquy with Petitioner and Petitioner's father:

[THE COURT]: What is your name, young man?

THE DEFENDANT: Deshawn, Deshawn Lyons.

* * * *

THE COURT: How old are you?

THE DEFENDANT: 16.

* * * *

THE COURT: Do you understand that your lawyer indicated there are two options, that if I should decide to treat you as an adult, you would have to be sentenced to the rest of your life in prison without parole, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: On the other hand, if I treated you as a juvenile, you would be committed to the Juvenile Authority for a period not to exceed your 21st birthday for rehabilitation and treatment, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Other than that, has anyone force (sic) [forced] you to do this?

THE DEFENDANT: No, sir.

THE COURT: Have you discussed this with Mr. Lyons also?

MR. LYONS [Respondent's father]: Yes, your Honor.

THE COURT: Do you think that he is acting in the best interest of your son discussing the possibility of a conviction and all the evidence in this case?

MR. LYONS: Absolutely.

Respondent then established a factual basis for the plea, in which he admitted to shooting one Douglas Thomas with a revolver on November 27, 1989.

As far as the evidentiary hearing to withdraw the guilty plea, Laurence Burgess, Respondent's attorney at the guilty plea proceeding, testified that he advised Respondent to plead guilty to first-degree murder in front of Judge Roberson. He acknowledged that this advice was out of the ordinary; that is, he had not heard of anyone having pled to first-degree murder in this situation. He explained why he advised Respondent to plead guilty to first-degree murder:

A Well, as I saw his case, I saw it as a difficult case in terms of defense and potential danger of being convicted. I knew Judge Roberson for many years and knew the kind of judge and the sentencing policies that he had and his

> sort of general philosophy in handling not so much these kind of cases but cases in general and handling youths. I believed that I could get a fair hearing from Judge Roberson and I believed that I could persuade him to sentence my client as a juvenile so I advised him to do what he did.

He recalled that Respondent was 16 years old at the time. When asked if it seemed to him that Respondent's age caused Respondent to be particularly reliant upon him, Mr. Burgess responded:

> A Yes, and I was very cautious about that. I was concerned about it; that's why I involved his father. In fact, I believe his father met with him before we had the discussion on the plea. I made some kind of arrangements for him to meet his father so he could discuss it with him because I really felt uncomfortable being in that role – this is sort of an unusual role for me. And I was basically placed in the role where I was both his father and like a parent advising him and I felt that I should really involve his father so that's what we did.

Mr. Burgess was asked if, when he discussed with Respondent the possible consequences of his pleading guilty and the likely result in the case, he ever promised Respondent

a particular result; Mr. Burgess responded that he did not When asked how strong his recommendation to Respondent to plead guilty to first-degree murder was, Mr. Burgess responded:

> A I think it was pretty strong. I thought that that was really the best thing to do. But, you know, it's a fine line when you're advising people to do things. I do urge them strongly and tell them what I think is in their best interest at that time and in this case I'm sure it was strong because I thought it was the best thing to do.

Mr. Burgess was asked if, in formulating his advice to Respondent, he took into account the fact that the prosecutor could appeal Judge Roberson's sentencing decision. Mr. Burgess responded that he didn't consider it at all and did not discuss it with Respondent.

Respondent testified that he was now 21 years old, and that he had been 16 years old at the time of his guilty plea. At that time, he had been in 7th grade, but, since then, he had obtained, while in juvenile custody, a high school diploma and 32 college credits.

Respondent recalled when Mr. Burgess advised him that he should plead guilty to first-degree murder. His (Respondent's) initial reaction to this advice had been that he did not want to do that; rather, he had wanted to fight it. What changed his mind was Mr. Burgess talking to him and his father and advising him that pleading guilty would be in his best interest.

Respondent was asked if he and Mr. Burgess ever discussed the fact that the prosecution could appeal the case if Judge Roberson sentenced him as a juvenile and the possibility that another court would reverse the sentence on the basis of finding that he should have been sentenced as an

adult; Respondent responded that they never discussed that. Respondent was asked whether he would have pled guilty to first-degree murder if he had known that there was a second hurtle to get past, even if Judge Roberson did sentence him as a juvenile; Respondent responded that he would have had to give it a lot of consideration. When asked if it would have been likely that he would have just chosen to go to trial, Respondent responded that likely he would have chosen to go to trial.

On cross-examination, Respondent was asked when it was he found out that the prosecution had appealed his juvenile sentence; he responded that he was at the Maxey Training School and he had just come back from a home visit and the fact that his juvenile sentence had been reversed was in the paper and his grandmother read it and told his mother. A few days later, he received a letter from his appellate counsel, Mr. Celeskey, wherein Mr. Celeskey told him that he was sorry, that his sentence had been overturned by the Court of Appeals; other than that, he had had no prior conversations with Mr. Celeskey. After the Court of Appeals overturned his sentence, Ms. Meinberg took over the case and she got the Court of Appeals' Opinion overturned, such that there was going to be a new appeal, that the Court of Appeals was going to listen to the case again; in fact, he was present at the oral argument on the new appeal. When asked if he ever told Ms. Meinberg around that time that he just wanted to withdraw his guilty plea, Respondent responded that he did not recall. There was then an objection to this line of questioning and Judge Roberson sustained the objection on the basis that Respondent would not have known about the possibility of withdrawing his guilty plea unless his lawyer told him that. When the prosecutor pointed out that Petitioner did have a lawyer at that point, Judge Roberson sustained the objection.

REASONS FOR GRANTING THE WRIT

I. Neither the United States Supreme Court nor any federal circuit has held that a lack of advice of collateral consequences of a guilty plea renders the plea involuntary. The Sixth Circuit in this case held that counsel was ineffective, not for any misadvice, but for "failing" to advise the respondent that the State could appeal the trial judge's decision whether to sentence him as a juvenile or an adult. Does this ruling constitute a "new rule" under the AEDPA, not applicable on habeas corpus; in the alternative, is the state court holding that defendant was not deprived of effective assistance an objectively unreasonable application of *Hill v. Lockhart*[4] and *Strickland v. Washington*?[5]

This case involves no "misadvice" as to the sentencing consequences of Respondent's plea; he was warned repeatedly by the trial judge that he might well be sentenced as an adult, not as a juvenile, and there is no claim that his counsel advised him differently. Ineffective assistance was predicated on a finding that trial counsel had an *affirmative* obligation to advise Respondent that should he be sentenced as a juvenile, the prosecution *could* appeal – an act not

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[4] *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[5] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

automatic, but requiring the exercise of independent judgment – and the result of the appeal *might* be an adult sentence – just as the trial judge had warned Respondent could occur as a consequence of his plea. The District Court held that the Michigan Court of Appeals' holding to the contrary was an unreasonable application of clearly established federal law, as determined by the United States Supreme Court in *Strickland v. Washington, supra*, and *Hill v. Lockhart, supra*. The Sixth Circuit Court of Appeals Opinion (the lead opinion, that is) agreed with the District Court.[6] But because neither this Court nor any federal circuit has found a guilty plea involuntary for a failure to advise of collateral consequences, and because ineffective assistance of counsel at a guilty plea occurs only when the resulting plea is involuntary,[7] the Sixth Circuit holding in this case constitutes a new rule, inapplicable under the AEDPA on habeas corpus.[8]

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[6] As will be discussed more fully in Argument II, the concurring opinion did not apply the deferential "objectively unreasonable" standard to the prejudice prong of *Strickland*.

[7] See e.g. *Johnson v Atherton*, 296 F.3d 991 (10th Cir. 2002); *DeVille v Whitley*, 21 F.3d 654 (4th Cir. 1994); *United States v Hernandez*, 234 F.3d 235 (5th Cir. 2000).

[8] At first blush, it might be argued that the proposition that counsel is ineffective in not advising a juvenile client that if he pleads guilty and is sentenced as a juvenile, the prosecution can appeal that sentence and possibly have it overturned, resulting in a sentence as an adult offender, is not a new rule but simply an application of *Strickland* and *Hill*, see *Sellan v. Kuhlman*, 261 F.3d 303, 309 (2nd Cir. 2001). But to find a plea involuntary for lack of advice regarding sentencing consequences is a new rule, and its "newness" cannot, or should not, be "shielded" by its incorporation into an ineffective assistance claim.

Petitioner submits that "incorporating" a new rule of involuntariness for guilty pleas based on a lack of advice as to a possible collateral consequence into an ineffective assistance claim should not shield the new rule from application of the AEDPA's prohibition of creation of new rules on habeas corpus. But even if *Strickland* is applied, the Sixth Circuit's majority ruling erroneously finds that the state court's unreasonably applied that case.[9]

Hill v. Lockhart, supra, established the applicability of the *Strickland* test to the guilty plea situation. First, the Court noted the existing case law that the voluntariness of the plea of a defendant represented by counsel during the plea process "depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' " *Id.* at 56, 106 S.Ct. at 369 (quoting *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970)). The Court then held that the two-pronged *Strickland* test previously applied in trial and trial-type situations was equally applicable to an attack on the voluntariness of a guilty plea, and further instructed that the second, or "prejudice" prong, required the defendant to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59, 106 S.Ct. at 370.

Applying *Hill v. Lockhart* to this case, the first question is whether the lack of advice that the prosecution could appeal a juvenile sentence constitutes deficient

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[9] As this Court recently noted in *Woodford v. Visciotti,* 537 U.S. –; – S.Ct. –; – L.Ed.2d – (Docket No. 02-137, decided November 4, 2002), "under § 2254(d)'s 'unreasonable application' clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied *Strickland* incorrectly. * * * * An unreasonable application of federal law is different from and incorrect application of federal law."

performance. The answer to this question turns on whether the prosecution's ability to appeal the sentence imposed by the trial court upon Respondent's plea of guilty would be a direct consequence or a collateral consequence of his plea, if indeed it can be called a "consequence" of the plea at all.

A direct consequence is one that has a definite, immediate, and largely automatic effect on the range of the defendant's punishment. *King v. Dutton,* 17 F.3d 151, 154 (6th Cir. 1994); *Parry v. Rosemeyer,* 64 F.3d 110, 114 (3rd Cir. 1995); *United States v. Campusano,* 947 F.2d 1, 5 (1st Cir. 1991) (cited with approval in *King v. Dutton*); *United States v. Brownlie,* 915 F.2d 527, 528 (9th Cir. 1990) (cited with approval in *King v. Dutton*). The fact that the prosecution could appeal the trial court's sentence of Respondent as a juvenile did not fall within the category of direct consequences, inasmuch as it was certainly not definite or automatic that the appellate courts would overturn Respondent's juvenile sentence if the prosecution appealed; in fact, there was a dissenting opinion when the prosecution did appeal and prevailed. See *People v. Haynes, supra,* 199 Mich. App. 593, 502 N.W.2d 758 (1993)

A collateral consequence of a guilty plea, on the other hand, is, for example, one that rests in the hands of another government agency or the defendant himself. *Torrey v. Estelle,* 842 F.2d 234, 236 (9th Cir. 1988). The fact that the prosecution had the right to appeal a juvenile sentence falls within this category.

The United States Constitution does not require defense counsel to inform an accused person of the collateral consequences of his guilty plea, *United States v Gonzalez,* 202 F.3d 20, 25-26 (1st Cir. 2000); *United States v. DeFreitas,* 865 F.2d 80, 82 (4th Cir. 1989); *United States v. Campbell,* 778 F.2d 764, 768 (11th Cir. 1985). Hence, the absence of advice of a collateral consequence cannot be held to fall below that objective standard of reasonableness as

contemplated by *Strickland v. Washington, supra*, and *Hill v. Lockhart,* supra.[10]

Assuming that the absence or lack of advice that the prosecution could appeal a juvenile sentence constitutes deficient performance, Respondent still failed to show prejudice from his trial attorney's lack of advice of the prosecution's appeal right.

First, Petitioner fails to see how the absence of advice to Respondent of the prosecution's appellate rights would have made Respondent's guilty plea unknowing and involuntary. Respondent was never advised by the trial court that sentencing as a juvenile offender was a certainty; rather, the opposite was the case. Hence, the fact that he might not have been told that the prosecution could appeal a sentence he was never assured of receiving in the first place should be of no consequence.

Second, Respondent, at the evidentiary hearing, admitted learning that the prosecution had indeed appealed the trial court's imposition of the juvenile sentence. No

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[10] Petitioner is cognizant that the Michigan Court of Appeals did not employ this analysis in its Opinion reversing the trial court's grant of Petitioner's motion to withdraw guilty plea. This would not matter, however, if the AEDPA deferential standard is to be applied to the *result* of the state court decision as opposed to the reasoning or lack thereof that the state court employed.

Petitioner is also cognizant that the lead opinion by the Sixth Circuit in this case declined to apply a collateral consequences analysis, citing its own precedent, *Harris v. Stovall,* 212 F.3d 940, 944 (6th Cir. 2000), for the proposition that it is error to rely on authority other than that of this Court. If this Court were, however, to reconsider and adopt the "any rational jurist " standard (see Argument II), it would, it seems, be appropriate to consider what the other circuit courts, which are presumably made up of rational jurists, have decided on a point of law to determine whether a particular state court decision is an unreasonable application of Federal law.

motion to withdraw guilty plea was ever filed while the prosecution's appeal was pending, however, even though Respondent could have asked the Michigan Court of Appeals to remand the matter back to the trial court to allow him to so move in the trial court. See e.g. *United States v. Arvanitis*, 902 F.2d 489, 494-495 (7th Cir. 1990) (defendant could not claim prejudice from attorney's inaccurate estimate of applicable offense severity rating for crimes to which he pled, and could not maintain ineffective assistance claim, *having previously foregone opportunity to withdraw plea with knowledge that attorney's prediction was wrong*).

Petitioner submits that what Respondent's apparent decision not to move to withdraw his guilty plea during the pendency of the Prosecutor's appeal of his juvenile sentence demonstrates is that the fact that the prosecution appealed the trial court's sentence of Respondent as a juvenile simply was not that important to Respondent, certainly not important enough for him to want to move to withdraw his plea so as not to take the chance that the Michigan Court of Appeals would issue a ruling adverse to him. The fact that Respondent did not move to withdraw his guilty plea until *after* the Michigan Court of Appeals reversed his sentence as a juvenile and the Michigan Supreme Court denied his Application for Leave to Appeal also demonstrates that the only real reason Respondent moved to withdraw his guilty plea was the fact that the trial court was directed by the Michigan Court of Appeals to impose a sentence as an adult offender.

In like fashion, the dissenting opinion in this case observed:

> Neither petitioner attempted to withdraw his guilty plea after the prosecution actually appealed; rather, they argued their case on the merits before the Court of Appeals. This makes sense: even with the possibility of prosecutorial appeal, the chance to be

> sentenced as a juvenile was their only option short of trial. Petitioners wanted a juvenile sentence, not a new trial. Petitioners, through counsel, gamed the system and attempted to withdraw their guilty pleas only after their juvenile sentences were rejected by the Court of Appeals. This post-conviction strategy gave petitioners two bites of the apple; that they now argue they would have given up their first (and *ex ante* more likely) bite because of the possibility of prosecutorial appeal defies credence.[11]

If there was no logic to support the result of the Michigan Court of Appeals decision in this case, it could truly be said that the result was objectively unreasonable. But there is logic to support it.

Because, then, the Sixth Circuit has incorporated a new rule of plea involuntariness for lack of advice – not

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[11] Petitioner is cognizant that the lead opinion minimizes the fact that Respondent did not move to withdraw his guilty plea once he found out that the prosecution could appeal his juvenile sentence, when the prosecution did in fact appeal his juvenile sentence, by observing that by that time the case was in the appellate courts, not the trial court, where withdrawal pleas had to be made. Lead opinion. n. 14. As Petitioner argued below, however, Respondent could have moved to have the case remanded from the Michigan Court of Appeals to the trial court so that he could move to withdraw his guilty plea. It is likely that there would have been no opposition to that by the prosecution since the prosecution objected to the guilty plea in the first instance. Of course, once Respondent elected instead to take his chances with the appellate process, which as the dissenting opinion notes, was a reasonable tact to take, the prosecution naturally objected once Respondent, having lost in the appellate courts, then moved to withdraw his guilty plea.

misadvice – regarding collateral consequences into an ineffective assistance analysis, the AEDPA bars relief. In the alternative, the state court determination that counsel was not ineffective in this situation is not an unreasonable application of *Strickland.*

II. The question left open by this Court's Opinion in *Williams v. Taylor*[12] is whether a state-court decision, purporting to dispose of a federal challenge on the merits but failing to articulate any reasoning or controlling federal authority, is an "adjudication" falling under the AEDPA § 2254 deferential standard of review. This Court should address this issue inasmuch as it has led to conflicting opinions in the circuits and because the answer to the question would be outcome-determinative in this case.

In this case, the District Court granted Respondent's habeas petition on one of the same bases the trial court granted Respondent's motion to withdraw his guilty plea, that is that Respondent's trial counsel had rendered constitutionally ineffective assistance of counsel in not advising Respondent that if he pled guilty as charged to first-degree murder and the other charges, and if Judge Roberson sentenced him as a juvenile, the prosecution could appeal that sentencing decision to the Michigan Court of Appeals and possibly have the sentence overturned with orders to Judge

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[12] *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

Roberson to sentence Respondent as an adult offender, meaning to non-parolable life.

In a split decision, with Judge Gilman rendering a separate concurring opinion, and Judge Boggs rendering a dissenting opinion, the Sixth Circuit affirmed the District Court's grant of the Writ of Habeas Corpus.

Judge Gilman, in his concurring opinion, held that because the Michigan Court of Appeals had not reached the prejudice prong of *Strickland v. Washington, supra*, the Court was not bound by the AEDPA's deferential standard of review.[13] Judge Gilman cited a Tenth Circuit case for this proposition, *Gonzales v. McKune,* 247 F.3d 1066, 1075-76 (10th Cir. 2001), and, based on that authority, applied a de novo standard of review to the issue of prejudice. Judge Gilman was correct to the extent that the Michigan Court of Appeals never reached the issue of prejudice; this was so because the Michigan Court found that there was no showing of deficient performance (the first prong under *Strickland*), and so, no need to address prejudice.

On the other hand, Judge Boggs, in his dissenting opinion, cited a Sixth Circuit case, *Harris v. Stovall,* 212 F.3d 940, 943, (6th Cir. 2000), which had held that where a state court decides a constitutional issue by form order or without extended discussion, a habeas court should focus on the *result* of the state court's decision, and perform an unreasonable application analysis. Based on that authority, Judge Boggs applied an unreasonable application analysis to the question of prejudice under *Strickland*, even though the Michigan Court of Appeals had not addressed the prejudice prong.

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[13] The deferential standard of review being, of course, that habeas relief may not be granted unless the state court adjudication resulted in a decision that is an unreasonable application of clearly established Federal law as determined by this Court.

In *Sellan v. Kuhlman, supra,* 261 F.3d at 313, n. 5, the Second Circuit aptly noted that there remained, in the Sixth Circuit, some unacknowledged tension between panel opinions on this issue. There still is, as a reading of the concurring and dissenting opinions in this case demonstrate. But, there is also a split among the various circuits. See again, *Sellan, supra,* 261 F.3d at 313, n. 5, and see Dodson, Habeas Review of Perfunctory State Court Decisions, 29 Am.J.Crim.L. 223, 227 (2002) ("The question begged by *Williams* is whether a state-court decision, purporting to dispose of a federal challenge on the merits but failing to articulate any semblance of reasoning or controlling federal authority, is an 'adjudication' falling under the AEDPA § 2254 deferential standard of review. The question has raised controversy in the lower courts.").

An answer to the question of whether the AEDPA deferential standard of review and the "objectively unreasonable" test apply to a state court's reasoning or to its ultimate decision, even absent any reasoning, would be outcome-determinative in this case. Indeed, as noted previously, Judge Gilman, in his concurring opinion, applied a de novo standard of review to the *Strickland* prejudice issue, whereas Judge Boggs applied the AEDPA deferential "objectively unreasonable" standard. Why the result of this case would have been different had the concurring opinion applied the same test that the dissenting opinion did is illustrated by the fact that the concurring opinion began with the candid observation that this was "an extremely close case." A number of courts have observed that a state court's decision in a close case cannot by definition be objectively unreasonable. See e.g. *Seymour v. Walker,* 224 F.3d 542, 554 (6th Cir. 2000), *cert. denied,* 532 U.S. 989, 121 S.Ct. 1643, 149 L.Ed.2d 502 (2001) ("In light of the closeness of the question, the trial court's finding cannot be said to be an unreasonable application of [United States Supreme Court precedent]."); *O'Brien v. Dubois,* 145 F.3d 16, 27 (1st Cir. 1998) ("We regard the question as a close one – but, under

AEDPA's newly minted standard of review, the very closeness of the call militates strongly against the granting of habeas redress."); *Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 895 (3rd Cir, 1999), *cert. denied sub. nom. Matteo v. Brennan,* 528 U.S. 824, 120 S.Ct. 73, 145 L.Ed.2d 62 (1999) ("To the extent the issue is a close one, AEDPA directs us to defer to the state court decision."). Thus, had Judge Gilman applied the deferential standard of review, he would have had to conclude, by necessity, that the Michigan Court of Appeals decision was not unreasonable.

Inasmuch as the question of whether the AEDPA deferential standard of review and the "objectively unreasonable" test apply to a state court's reasoning or to its ultimate decision is a question that this Court should address, and, because the answer would be outcome-determinative in this case, the question becomes: to what does the deferential standard apply.

Petitioner would pose the same rationale that the Second Circuit, in *Sellan v. Kuhlman, supra,* posed, in addressing the question and arriving at the conclusion that the deferential standard of review applies to a state court's ultimate decision, even if the decision does not contain any reasoning as to how the result was arrived at. How the Court in *Sellan* arrived at its conclusion is as follows:

> Section 2254(d)(1)'s "unreasonable application" test is triggered when a federal claim has been "adjudicated on the merits" in state court. Thus, the application of §§ 2254(d)(1) turns on the meaning of "adjudicated on the merits" – more specifically, on whether a federal claim is "adjudicated on the merits" when the state court decision that disposes of it neither discusses the claim nor references federal law.

* * * *

> Nothing in the phrase "adjudicated on the merits" requires the state court to have explained its reasoning process. Nowhere does the statute make reference to the state court's process of reasoning. *See Aycox v. Lytle,* 196 F.3d 1174, 1177 (10th Cir.1999). As the Fourth Circuit has explained, when a state court fails to articulate the rationale underlying its rejection of a petitioner's claim, and when that rejection is on the merits, the federal court will focus its review on whether the state court's ultimate decision was an "unreasonable application" of clearly established Supreme Court precedent. *See Bell v. Jarvis,* 236 F.3d 149 (4th Cir.2000), *petition for cert. filed* (U.S. Mar. 29, 2001).
>
> In sum, the plain meaning of §§ 2254(d)(1) dictates our holding: For the purposes of AEDPA deference, a state court "adjudicate[s]" a state prisoner's federal claim on the merits when it (1) disposes of the claim "on the merits," and (2) reduces its disposition to judgment. When a state court does so, a federal habeas court must defer in the manner prescribed by 28 U.S.C. §§ 2254(d)(1) to the state court's decision on the federal claim – even if the state court does not explicitly refer to either the federal claim or to relevant federal case law.
>
> 261 F.3d at 311-312.

Dodson, in his article, Habeas Review of Perfunctory State Court Decisions on the Merits, supra, 29 Am.J.Crim.L. at 242-243, arrives at the same conclusion.

III. To grant habeas corpus relief, the state court decision must have been either contrary to or an unreasonable application of settled federal constitutional principle as determined by this Court. An unreasonable application is not simply one that is erroneous or incorrect. Given the rejection of the "any rational jurist" test by this Court, certiorari should be granted to give further guidance, so that federal courts do not simply conclude that because they disagree with the state courts the state court decision was therefore unreasonable.

In *Williams v Taylor, supra,* 529 U.S. at 409-410, 120 S.Ct. at 1521-1522, this Court rejected the view of some circuits that the state court application of settled federal constitutional principles as determined by this Court can only be unreasonable if the state court "has applied federal law in a manner that reasonable jurists would all agree is unreasonable." Instead, said this Court, the reviewing court should simply determine whether the state court acted unreasonably, bearing in mind that "the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." In other words, "a federal habeas court may not grant relief simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." This Court reaffirmed this latter principle in *Bell v. Cone,* – U.S. – , 122 S.CT. 1843, 152 L.Ed.2d 914 (2002).

The concurring opinion in this case expressly stated that it was not applying the deferential AEDPA standard of review to the Michigan Court of Appeals decision, and explained why not. The lead opinion was not so candid.

While the lead opinion states that the Michigan Court of Appeals Opinion was an unreasonable application of United States Supreme Court precedent, that is *Hill v. Lockhart, supra*, and *Strickland v. Washington, supra*, a reading of the lead opinion's analysis reveals that the lead opinion analyzed the case as if it were reviewing the case on a direct appeal of a federal criminal case and not under the highly deferential standard of 28 U.S.C. § 2254(d)(1) and *Williams v. Taylor*.

Petitioner submits that this case demonstrates that further guidance from this Court is needed as to the application of the "unreasonable " requirement of the federal statute. Petitioner suggests that if the state court decision – even if viewed as wrong as an independent matter by the habeas court – is within the range of "plausible outcomes," the writ must be denied. Or, Petitioner submits, this Court's reconsideration of its rejection of the "any rational jurist" test might be appropriate, particularly in light of this Court's statement in *Slack v McDaniel*, 529 U.S. 473, 484,120 S.Ct. 1595, 1604, 146 L.Ed.2d 462 (2000), that the test for a certificate of appealability is whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right."

Consideration of this important question warrants the attention of this Court.

RELIEF

Wherefore, Petitioner respectfully requests that this Honorable Court grant certiorari in this matter.

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Dated:

00-2153

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DASHAWN LYONS,	)	**Filed**
Petitioner-Appellee,	)	**Oct. 02, 2002**
	)	**Leonard Green,**
v.	)	**Clerk**
	)	**Order**
ANDREW JACKSON, WARDEN,	)	
Respondent-Appellant.	)	

BEFORE: BOGGS, GILMAN, and BRIGHT, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Boggs would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/S/

Leonard Green, Clerk

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*Hon. Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

APPENDIX B

RECOMMENDED FOR FULL PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

File Name: 02a0266p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DaShawn Lyons,

Petitioner-Appellee, No. 00-2153

v.

Andrew Jackson, Warden,

Respondent-Appellant.

Appeal from the United States District Court

for the Eastern District of Michigan at Detroit.

Nos. 98-74655; 98-73406--Denise Page Hood, District Judge.

Argued: October 26, 2001

Decided and Filed: August 8, 2002

Before: BOGGS, GILMAN, and BRIGHT, Circuit Judges.(*)

COUNSEL

ARGUED: Thomas M. Chambers, OFFICE OF THE PROSECUTING ATTORNEY, Detroit, Michigan, for Appellants. John R. Minock, CRAMER MINOCK, Ann Arbor, Michigan, Marla R. McCowan, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellees. **ON BRIEF:** Thomas M. Chambers, OFFICE OF THE PROSECUTING ATTORNEY, Detroit, Michigan, for Appellants. John R. Minock, CRAMER MINOCK, Ann Arbor, Michigan, Marla R. McCowan, Susan M. Meinberg, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellees.

BRIGHT, J., delivered the opinion of the court. GILMAN, J. (pp. 24-28), delivered a separate concurring opinion. BOGGS, J. (pp. 29-33), delivered a separate dissenting opinion.

OPINION

MYRON H. BRIGHT, Circuit Judge. Andrew Jackson, the warden of a Michigan state correctional institution, appeals a federal district court's conditional grant of habeas corpus to prisoner Dashawn Lyons(1) on the ground of ineffective assistance of counsel. Lyons is currently serving a life sentence without parole after pleading guilty to first degree murder.

In 1990, Lyons was sixteen years old and had received an education to the seventh grade. On advice of counsel, who believed it likely the trial court would impose a juvenile sentence, Lyons pled guilty in Michigan state

court to first degree murder. The trial court did sentence Lyons as a juvenile. The prosecution appealed, the Michigan Court of Appeals reversed, and Lyons received the only available adult sentence under Michigan law: life in prison without possibility of parole. Lyons' trial counsel did not consider or advise Lyons that the prosecutor could appeal the imposition of a juvenile sentence.

Lyons petitioned for a writ of habeas corpus, and the federal district court(2) concluded that the failure of Lyons' counsel to inform him of the prosecutor's right to appeal, particularly in light of Lyons' youth at the time of the plea, constituted ineffective assistance of counsel. The court further concluded that a contrary determination on the facts and the law by the Michigan Court of Appeals constituted an unreasonable application of clearly established federal law as determined by the United States Supreme Court in *Williams v. Taylor*, 529 U.S. 362 (2000); *Hill v. Lockhart*, 474 U.S. 52 (1985); and *Strickland v. Washington*, 466 U.S. 668 (1984). Accordingly, the court granted Lyons' petition for a writ of habeas corpus on the ground of ineffective assistance of counsel.(3) The warden appeals. After a careful review of the record, we **AFFIRM** the district court.

I. BACKGROUND

On November 27, 1989, Lyons shot and killed Douglas Thomas. The state of Michigan charged Lyons with first degree murder and possession of a firearm during commission of a felony.

Lyons' trial in the Recorder's Court for the city of Detroit was scheduled to begin on March 5, 1990. The assigned judge had another jury trial that day, so Lyons' trial was postponed to the next day and transferred to the docket of Judge Roberson, Chief Judge of the Recorder's Court. The

next day, March 6, Lyons pled guilty to first degree murder before Chief Judge Roberson on the advice of his defense counsel, Laurence Burgess.

At the plea hearing that day, Burgess informed the court that he recognized it was unusual to offer a plea to first degree murder, but he had discussed the matter with Lyons and Lyons' father who was present in the courtroom. Burgess stated his conviction that he would be able to convince the court to sentence Lyons as a juvenile and explained that "on the basis of that" Lyons wanted to offer a guilty plea.

The court questioned Lyons as to whether he understood the two greatly disparate sentencing possibilities available to the court in his case. Lyons affirmed his understanding that if the court decided to treat him as an adult, the court had no option but to sentence him to life in prison without parole; but if the court treated him as a juvenile, he would be committed to the state juvenile authority for a period not to exceed his twenty-first birthday.(4) Lyons also stated that he was not being coerced into his plea, had not been promised anything in return for his plea, and was aware of the various trial rights he was foregoing by pleading guilty.

The court then questioned Lyons briefly as to the factual basis of the crime. Lyons stated that he knew the victim and went to the victim's house. Lyons was carrying a revolver at the time. Lyons stated: "I went to take his wallet. There was a struggle and I got scared and shot him." The court specifically asked Lyons if he had tried to rob the victim and Lyons admitted he had.

On November 30, 1990, after a sentencing hearing conducted over a number of months, Chief Judge Roberson concluded that it was appropriate to sentence Lyons as a

juvenile. The court ordered that Lyons be confined to a maximum security state juvenile facility until age twenty-one.

The prosecutor appealed the juvenile sentence disposition.(5) The state court of appeals reversed and remanded for sentencing as an adult, i.e., mandatory life imprisonment without parole on the first degree murder charge. On appeal, the Michigan Supreme Court ordered a stay of further trial court proceedings, then vacated the court of appeals opinion on the ground of ineffective assistance of appellate counsel and remanded to the court of appeals for rebriefing. The court of appeals again reversed and remanded for imposition of the adult sentence. The Michigan Supreme Court denied leave to appeal.

At his resentencing before Chief Judge Roberson on January 30, 1995, Lyons orally moved to withdraw his guilty plea. Pursuant to recent Michigan Supreme Court orders in similar cases, Chief Judge Roberson immediately imposed the adult sentence of life without parole and deferred consideration of the motion until an evidentiary hearing could be scheduled.(6) Lyons later filed a written motion to withdraw his guilty plea.

On April 13, 1995, the trial court held an evidentiary hearing on Lyons' motion to withdraw his plea. Lyons' trial counsel, Burgess, testified. Burgess stated that he did almost entirely trial work and handled very few appellate cases. Burgess explained that he had prepared for the March 5, 1990, trial before the originally assigned judge. But upon learning that his client's case had been transferred to Chief Judge Roberson, Burgess changed tack and recommended to Lyons that he plead guilty. Although Burgess believed that he could argue an imperfect self-defense claim on Lyons' behalf at trial, which might result in Lyons being convicted of a lesser

offense, Burgess's knowledge of Chief Judge Roberson's sentencing policies and general philosophy for handling juveniles convinced him that he "could get a fair hearing from Judge Roberson and . . . persuade him to sentence [Lyons] as a juvenile." Accordingly, Burgess took the "unusual" step of advising Lyons to plead guilty to first degree murder.

Burgess acknowledged that prior to March 5, he and Lyons had "discuss[ed] the trial more than anything else" and their main discussion regarding Lyons' guilty plea took place only in the few hours after the case had been reassigned to Chief Judge Roberson. Burgess realized that the sixteen-year-old Lyons was relying heavily on his advice, nonetheless he strongly recommended the plea. Burgess also discussed the situation with Lyons' father and advised him that it was in Lyons' best interest to plead guilty.(7)

Burgess testified that, in formulating his advice to Lyons, he did not consider the prosecutor's right to appeal a trial court's sentencing decision.

> Q In formulating your advice to Mr. Lyons did you take into account the fact that the Prosecution had a right to appeal Judge Roberson's decision?
>
> [Burgess] No, didn't consider that at all and I certainly didn't discuss it with him. But it really didn't enter my mind.
>
> . . . .
>
> Q You didn't take that into consideration in formulating your own opinion as to the best choice for him?

> [Burgess] No. It's not something that I would even think about. My reasoning was that Judge Roberson would be fair. I thought I could convince him that this young man should be sentenced as a juvenile. I never in my wildest dreams thought the Court of Appeals or a Supreme Court would reverse a judge on a discretion such as this . . . .
>
> Q If you had taken that into consideration, are you able to say whether it would have made a difference in your advice?
>
> [Burgess] . . . I can't really tell you whether or not I would have gone ahead and still advised him of this but at least he should have been aware of it and in that case I was remiss, I guess. But it's not something I even thought about. I can tell you.

Lyons J.A. at 143-45.

Lyons testified at the evidentiary hearing as well. He stated that when Burgess advised him to plead guilty, he initially "wanted to fight" the charges and go to trial. However, he eventually acceded to the plea, relying on the advice and information Burgess provided to him. Lyons then testified about Burgess's failure to inform him of the prosecutor's right to appeal and the impact such information would have had on his decision to plead guilty.

Q Did you and Mr. Burgess discuss the fact that the Prosecutor had a right to appeal the case and if Judge Roberson sentenced you as a juvenile another court could decide to reverse that and say, no, you have to be sentenced as an adult?

[Lyons] No, we did not.

Q If [Burgess] advised you there was a second hurdle to get past, a second risk regarding a juvenile versus the adult sentence, would you have plead guilty to first degree murder?

. . . .

[Lyons] Likely I would have chosen to go to trial.

Lyons J.A. at 156.

Lyons testified that he first learned about the prosecutor's appeal when a relative read in a newspaper that Lyons' juvenile sentence had been overturned by the court of appeals.(8) He did not recall whether he considered withdrawing his plea when the state supreme court vacated the decision of the court of appeals and remanded for rebriefing.

As to the factual basis for his earlier plea, Lyons testified that he did not go to the victim, Thomas's, residence with the intent to kill him, but rather to see about some money Thomas owed him. Lyons tried to get the money by reaching for the wallet in Thomas's pocket. A gun was on the floor. Thomas grabbed the gun first and

the two of them struggled over it. Lyons got the gun and shot Thomas. Lyons denied trying to rob Thomas of his wallet.(9)

The trial court determined that Lyons' guilty plea had not been voluntary, knowing and intelligent due to ineffectiveness of trial counsel. The court granted Lyons' motion to withdraw his guilty plea. The Michigan Court of Appeals granted leave to the prosecutor to appeal that order.

In a consolidated decision addressing Lyons' case along with two other similarly situated appellants, the appeals court reversed the trial court.(10) *People v. Haynes (After Remand)*, 562 N.W.2d 241 (Mich. App. 1997). The court determined that the record showed Lyons was aware, at the time he pled guilty, that he might be sentenced as an adult to a mandatory term of life imprisonment without possibility of parole. Despite this knowledge, Lyons pled guilty and did not move to withdraw his plea until after the conclusion of the appeal regarding his sentence. Therefore, the court concluded, Lyons understood the consequences of his plea, and the plea was knowingly, understandingly, and voluntarily made. *Haynes (After Remand)*, 562 N.W.2d at 250. The Michigan Supreme Court denied Lyons leave to appeal.

In August 1998, Lyons petitioned the federal district court for a writ of habeas corpus. The court conditionally granted the writ, ordering Lyons' release unless he was given a trial. The district court concluded that as a result of ineffective assistance of trial counsel Lyons had not pled guilty voluntarily or knowingly.(11) The warden appealed to this court.

II. DISCUSSION

A. Habeas Corpus Review

Provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) codified at 28 U.S.C. §§ 2254(d) govern our review of the state court decisions in this habeas corpus case.

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

28 U.S.C. §§ 2254(d)(1).

The federal district court considered Lyons' petition for habeas corpus under the "unreasonable application" prong of this statute. Neither party argues that the federal district court should have inquired whether the Michigan Court of Appeals decision was "contrary to" clearly established federal law. We proceed, therefore, under the "unreasonable application" prong of 28 U.S.C. §§ 2254(d)(1).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court elucidated the terms of 28 U.S.C. §§ 2254(d)(1). First, the Court explained that "clearly

established Federal law, as determined by the Supreme Court" refers to the Court's holdings, as opposed to dicta, at the time of the relevant state court decision. *Id.* at 412. Second, the Court explained that a state court decision unreasonably applies Supreme Court precedent by either: (1) identifying the correct governing legal rule from Supreme Court precedent but unreasonably applying it to the facts; or (2) unreasonably extending a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refusing to extend that principle to a new context where it should apply. *Id.* at 407. Finally, the Court declared that the application of law must be objectively unreasonable, *id.* at 409, and not merely incorrect or erroneous.(12) *Id.* at 411.

B. Ineffective Assistance of Counsel

In *Hill v. Lockhart*, 474 U.S. 52 (1985) and *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set out the law applicable to an ineffective assistance of counsel claim such as that made by Lyons. Both *Hill* and *Strickland* were clearly established federal law as determined by the Supreme Court at the time of the final Michigan Court of Appeals decision in 1997. *See Williams*, 529 U.S. at 391, 406 (referring to *Strickland* as "clearly established precedent" at the time of a Virginia state court's 1997 decision).

Under *Strickland*, a defendant claiming ineffective assistance of counsel must show both deficient performance by counsel and prejudice to the defendant resulting from that deficient performance. 466 U.S. at 687. To be deficient, counsel's performance must fall below an objective standard of reasonableness. *Id.* at 687-88; *Hill*, 474 U.S. at 58-59. In *Hill*, which applied *Strickland* to the guilty plea context, the Court explained that a defendant

shows prejudice by demonstrating "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

Although the Michigan Court of Appeals did not mention either *Hill* or *Strickland* by name, it did apply the law of those cases.(13) Thus, we must examine whether that court applied *Hill* and *Strickland* unreasonably.

We emphasize that *Hill* and *Strickland* state the relevant law in this case. Relying on a string of circuit court cases, the warden argues that defense counsel's failure to inform Lyons of the prosecution's right to appeal the imposition of a juvenile sentence does not comprise ineffective assistance because the prosecutor's right of appeal represents a collateral, as opposed to a direct, consequence of the plea. We reject this argument on two grounds.

First, the warden's reliance on circuit court cases is improper. The AEDPA prohibits use of lower court decisions in determining whether the state court decision is contrary to, or is an unreasonable application of, clearly established federal law. *Williams*, 529 U.S. at 412 (defining "clearly established law as determined by the Supreme Court" to mean holdings of Supreme Court decisions); *Harris*, 212 F.3d at 944 (holding district court erred in "rely[ing] on authority other than that of the Supreme Court of the United States in its analysis under §§ 2254(d)").

Second, the warden's argument is incompatible with Supreme Court case law. The Court does not use a direct/collateral consequence categorization scheme to decide ineffective assistance of counsel claims. Indeed, in *Hill*, the Supreme Court reviewed an Eighth Circuit

decision holding that parole eligibility was not a "direct consequence" of a guilty plea. *See Hill v. Lockhart*, 731 F.2d 568, 570-73 (8th Cir. 1984). The Court noted this holding, but eschewed any such characterization in favor of directly applying *Strickland* to the plea context. *Hill*, 474 U.S. at 55, 57-60. As the Court stated in *Williams*: "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." 529 U.S. at 391.

C. Analysis

The federal district court concluded that the Michigan Court of Appeals decision was an unreasonable application of *Hill* and *Strickland*. We review *de novo* a district court's legal conclusions in a habeas corpus proceeding. *Miller v. Francis*, 269 F.3d 609, 613 (6th Cir. 2001). Where, as here, the district court's factual findings are based on a transcript from the state court proceedings and the district court makes no credibility determination, we also review those findings *de novo*. *Id.* We must determine whether it is an unreasonable application of *Hill* and *Strickland* to hold either: (1) that Lyons' trial counsel provided him with objectively reasonable assistance; or (2) that even if Lyons had been reasonably advised, he still would have pled guilty.

1. Performance of Counsel

The proper measure of attorney performance is whether counsel's assistance was reasonable "under prevailing professional norms" and "considering all the circumstances." *Strickland*, 466 U.S. at 688. We make a case-by-case examination of the evidence, *Williams*, 529 U.S. at 391, and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

The professional norms that guide us rest upon defense counsel's fundamental duties "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process" and "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Id.* at 688.

The federal district court articulated the circumstances relevant to the performance inquiry in this case:

> [T]rial counsel's performance was deficient within the meaning of the *Strickland* standard where he failed to advise petitioner that the prosecutor could appeal a juvenile sentence to a Michigan appellate court with the very real possibility that a higher court would order petitioner resentenced as an adult. Because of petitioner's young age, petitioner was particularly reliant on his attorney's advice to plead guilty to the offenses in this case. In light of counsel's extraordinary advice to petitioner that he plead guilty to an offense which carried a mandatory sentence of life imprisonment without parole, counsel had a duty both to consider and to advise petitioner of the prosecutor's right to appeal any sentence to the Michigan appellate courts, with the possibility that petitioner's juvenile sentence would be overturned on appeal and he would then have to serve a nonparolable life sentence.

Lyons v. Jackson, No. 99-CV-70453-DT, Slip Op. at 13 (E.D. Mich. Aug. 31, 2000).

Lyons' trial counsel, Burgess, brought to bear on this case his knowledge of Chief Judge Roberson's sentencing practices. Without any doubt, in this regard Lyons initially benefitted from counsel's knowledge. Furthermore, Burgess adequately informed Lyons regarding the risks as they related to Chief Judge Roberson's sentencing determination. Lyons understood that if he pled guilty Chief Judge Roberson could opt to impose either a severe adult sentence of life imprisonment or a lenient juvenile sentence.

However, Burgess acted incompetently in failing to consider the likelihood that the prosecutor would exercise his right to appeal the district court's imposition of a juvenile sentence. Any juvenile sentence imposed on Lyons would be less than five years in a juvenile facility. Given such a lenient sentence for first degree murder, it was unreasonable for Burgess not to have considered that the prosecutor could appeal and the juvenile sentence could be reversed. Yet Burgess did not factor this scenario into his advice to Lyons that pleading guilty was in Lyons' best interest.(14)

Thus, Lyons did not know that the prosecutor could appeal and that the juvenile sentence could be reversed, and, if so, Lyons would serve a life sentence without possibility of parole. Lyons was left unaware that, even if Burgess's assessment on his chances of receiving a juvenile sentence from Chief Judge Roberson were correct, this was not a one-act play in Chief Judge Roberson's courtroom.

Burgess should have considered these possibilities, informed Lyons about them, and incorporated them into his risk assessment when he advised Lyons about pleading

guilty. He failed to do so. Rather, he advised Lyons to plead guilty based solely upon his assessment of the relative risks in going to trial versus pleading guilty before Chief Judge Roberson. As a result, Burgess misinformed Lyons regarding the likelihood he would receive an adult sentence. Lyons was not fully apprised of the risks he faced.

The duty of defense counsel to consult is paramount when a client has to decide whether or not to waive a constitutional right, such as the right to trial. Because the decision whether or not to plead guilty ultimately rests with the client, *see Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"); *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring) ("[o]nly such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make"), counsel must ensure that the client's decision is as informed as possible. Failing even to consider, let alone notify the client of, a factor that could negate the entire benefit of the guilty plea is not within the range of professional norms.(15)

Lyons' age and his heavy reliance on Burgess, a reliance of which Burgess was aware, enhanced Burgess's duty to make certain that Lyons understood all the risks associated with his guilty plea. Lyons was sixteen years old and had a seventh grade education. His father knew nothing about the applicable law. Burgess acknowledges that he was "placed in the role where [he] was both [Lyons'] lawyer and like a parent advising him." This case epitomizes the criminal defendant's need for what the

Supreme Court has called the "guiding hand of counsel at every step in the proceeding against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

We conclude that Lyons' trial counsel was incompetent. It is an objectively unreasonable application of *Hill* and *Strickland* for the Michigan Court of Appeals to hold otherwise.

2. Prejudice

To determine whether Lyons was prejudiced by his counsel's deficient performance, we ask whether there is a reasonable probability that, had he been advised of the prosecutor's right of appeal, he would not have pled guilty. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome; it is less than a preponderance of the evidence. *Strickland*, 466 U.S. at 694.

The warden argues that Lyons could not have been prejudiced by any deficiency on the part of his trial counsel because Lyons acknowledged at the plea hearing in March 1990 that he could receive an adult sentence of life imprisonment without parole.(16) According to the warden, "the fact that [Lyons] might not have been told that the prosecution could appeal [the juvenile] sentence he was never assured of receiving in the first place should be of no consequence."

The warden maintains that if a defendant is aware of the maximum possible sentence he cannot be prejudiced by his counsel's failure to inform him of the prosecutor's right to appeal. We decline to adopt the warden's argument. An awareness of the sentencing range available to the trial judge is not the same as an informed understanding that a sentencing judge's decision is subject to reversal. The rule suggested by the warden would preclude courts from finding prejudice in any situation where the defendant knew the range of penalties to which he was subject.

Furthermore, the circumstances of this case illustrate the failings of the warden's argument. Lyons pled guilty in hopes of avoiding life imprisonment without parole. A reduced likelihood of being sentenced as an adult was the sole benefit of Lyons' guilty plea before Chief Judge Roberson. In reality, the risk of being sentenced as an adult came in two parts: (1) being sentenced as an adult by Chief Judge Roberson; and (2) having received a juvenile sentence from Chief Judge Roberson, being subject to a successful appeal by the prosecutor. Lyons, however, was informed by his attorney, Burgess, of only the first risk. Burgess's failure to assess all the risks and inform his client left Lyons to make the most important decision of his life without essential information. Presented with all the risks, Lyons might well have decided to plead not guilty and to take his chances at trial.

Indeed, Lyons puts forth evidence that he would have pled not guilty. At the evidentiary hearing on his plea withdrawal motion, Lyons testified that he would not have pled guilty had he known of the prosecutor's right to appeal. This testimony, though self-serving, may be enough by itself to satisfy the prejudice prong under the circumstances here. *See Magana v. Hofbauer*, 263 F.3d 542, 547 n.1 (6th Cir. 2001) (noting that, unlike the Seventh and Second Circuits, this Circuit has not explicitly adopted a requirement that in order to establish prejudice a defendant must come forward with objective evidence in addition to his post-conviction claim that he would have changed his mind about pleading guilty). We need not decide this issue here because other evidence supports Lyons' claim of prejudice.

At the March 1990 plea hearing, Burgess told the court that Lyons wished to offer a plea of guilty "on the basis of" Burgess's belief that he could convince Chief Judge Roberson to sentence Lyons as a juvenile. Later, at the evidentiary hearing on Lyons' motion to withdraw his guilty plea, Burgess acknowledged the possibility that, had he considered the possibility that the prosecutor would appeal a juvenile sentence, he might not have recommended that Lyons plead guilty. Both Lyons and his counsel testified that Lyons relied heavily on the attorney's advice; thus, evidence that Burgess might have changed his recommendation indicates that Lyons would have been more likely to demand a trial rather than plead guilty.

Lyons testified at the plea withdrawal hearing that, when first presented with Burgess's advice that he plead guilty, Lyons initially "wanted to fight" and put the government to its burden of proof. Burgess corroborated Lyons' belief that he had defenses to the first degree murder charge. In fact, Burgess and Lyons had been concentrating almost exclusively on trial preparation up until the date of the trial, when the case was transferred to Chief Judge Roberson. Given this background, had Burgess advised Lyons of *all* the risks he was facing, Lyons might have pled not guilty.

To meet the prejudice requirement under *Strickland* and *Hill*, Lyons need only show a reasonable probability that he would have pled not guilty had Burgess's performance been objectively reasonable. We conclude that Lyons' and Burgess's testimony, along with reasonable inferences from the facts and circumstances of this case, are sufficient to demonstrate not only a reasonable probability that Lyons would have decided to plead not guilty but also that a contrary conclusion is objectively unreasonable.

III. CONCLUSION

We conclude that Lyons received constitutionally ineffective assistance of counsel. We further conclude that a decision to the contrary on the facts of this case is an unreasonable application of clearly established federal law. We therefore **AFFIRM** the federal district court's conditional grant of habeas corpus.

CONCURRENCE

RONALD LEE GILMAN, Circuit Judge, concurring. I fully concur with the lead opinion's conclusion that Lyons's counsel was constitutionally ineffective because of the lawyer's failure to inform Lyons that the state could appeal the decision of the trial judge to sentence him as a juvenile. My reason for writing separately is to explain, in what I regard as an extremely close case, why I find the well-written dissenting opinion less persuasive than the lead opinion.

Like the lead opinion, I believe that the Michigan Court of Appeals's determination that Lyons's counsel performed competently was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). The dissent, in contrast, finds counsel's performance to be constitutionally competent, a conclusion with which I disagree for several reasons.

First, in reaching the conclusion that Lyons's counsel provided competent representation, the dissent does not address the failure of counsel to inform Lyons that the state could appeal the trial judge's sentencing decision. The dissent instead focuses solely on whether counsel's

strategy was reasonable in light of his knowledge of the trial judge's sentencing tendencies, thereby overlooking the very omission that in my opinion rendered the performance of Lyons's counsel deficient.

Second, because Lyons's counsel never considered the possibility of the state appealing the trial judge's sentencing decision, his advising Lyons to plead guilty to first-degree murder cannot be considered a reasonable strategic decision to which deference should be accorded. *Strickland*, 466 U.S. at 690-91 (explaining that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"). As the lead opinion notes, a reasonable attorney would have considered the possibility of an appeal before advising Lyons to plead guilty under the circumstances of the present case.

Finally, I believe that the dissent's consideration of the strength of the state's case against Lyons in assessing whether counsel provided competent representation, including the suggestion that his only available defense was a hope for jury nullification, focuses on the wrong issue. Lyons, in my opinion, was entitled to be advised of the possibility of an appeal before deciding whether to plead guilty, because without that knowledge his decision was not based upon all of the relevant facts. Although the Supreme Court has held that the Sixth Amendment does not require a correct assessment of the risks and benefits of pleading guilty as opposed to proceeding to trial, it recognizes that counsel must at least be aware of such risks, especially where the lack of awareness directly impacts the reasoning behind whatever advice is provided. *See*

McMann v. Richardson, 397 U.S. 759, 770 (1970) ("Questions like these [relating to the risks of trial] cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be."); *United States v. Hanley*, 906 F.2d 1116, 1121 (6th Cir. 1990) (recognizing that "a reversal for ineffective assistance would be in order" if the defendant had pled guilty solely in reliance upon his counsel's erroneous advice "that he would be eligible for parole in one-third the time he received for sentence").

I also agree with the lead opinion that if Lyons's counsel had informed Lyons that the state could appeal the trial judge's sentencing decision, a reasonable probability exists that Lyons would have proceeded to trial rather than plead guilty. In considering *Strickland*'s "prejudice" prong, we are not bound by AEDPA's deferential standard of review, because the Michigan Court of Appeals never reached the issue of prejudice when it determined that counsel's performance was not deficient. *See Gonzales v. McKune*, 247 F.3d 1066, 1075-76 (10th Cir. 2001) (explaining that because the state court considered only two of three requirements necessary to establish a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a de novo standard of review applied to the third element). I therefore believe that the dissent's application of AEDPA's "objectively unreasonable" test to the prejudice component of *Strickland* is not appropriate. *Williams v. Taylor*, 529 U.S. 362, 409 (2000) (clarifying the meaning of an "unreasonable application" of law under 28 U.S.C. §§ 2254(d)(1)).

The dissent concludes that Lyons's effort to withdraw his guilty plea constituted an attempt to get "a second bite at the apple," and that Lyons entered his guilty plea voluntarily and with full knowledge of the possible

sentence that he faced. I respectfully disagree. Although Lyons did not seek to withdraw his guilty plea during the state appellate process, the record reflects that he was not advised by his attorney that the state had even appealed. His first knowledge of the state's appeal was approximately two years later, when a relative read about the Michigan Court of Appeals's decision ordering him to be sentenced as an adult. Thus, the dissent's inference that Lyons was "gaming the system" is unwarranted under these circumstances.

With respect to whether Lyons entered his guilty plea knowingly and intelligently, I believe that the dissent underestimates the significance of a possible appeal in any calculation that Lyons or his counsel made. Lyons might have believed that he had, say, an 80% chance of being sentenced as a juvenile by the particular trial judge before whom he pled guilty. If he had been advised that the state could appeal, however, he might have evaluated the odds of the trial judge's determination being sustained on appeal as only 50-50. The risk of the trial judge's sentencing decision being reversed on appeal would, in this example, reduce the ultimate likelihood of Lyons being sentenced as a juvenile from 80% to only 40%.

We are unable, of course, to determine the exact odds that Lyons believed he faced prior to pleading guilty, but the above example illustrates the significance of failing to consider the possibility of the state appealing. The fact that Lyons was aware of the maximum penalty he faced does not, therefore, negate the significance of the information that neither he nor his counsel considered. Perhaps Lyons would have pled guilty even if he had known that the trial judge's sentencing decision was not the only hurdle that he had to overcome in order to be sentenced as a juvenile. But he was entitled to be advised

of *all* the risks that he faced before choosing to plead guilty and foregoing his right to a jury trial.

Because I am not confident that Lyons would have pled guilty if his counsel had informed him that his sentence could be appealed, I concur with the lead opinion in concluding that the decision of the Michigan Court of Appeals was an unreasonable application of *Strickland*. 28 U.S.C. §§ 2245(d)(1) (providing that a writ of habeas corpus is available for a person in state custody if the state court's adjudication of the petitioner's claim "resulted in a decision that . . . involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States"); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."); *Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

DISSENT

BOGGS, Circuit Judge, dissenting. I disagree with the majority's analysis and would reverse the grant of habeas corpus. I therefore respectfully dissent. The Michigan Court of Appeals decided that, in this case, a failure to inform a criminal defendant, before a guilty plea, that the prosecution may have a right to appeal his being sentenced as a juvenile, does not constitute ineffective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, the petitioner must show

(1) deficient performance by the attorney, and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). Legitimate trial tactics are expressly excluded from the definition of deficient performance. *Bell v. Cone*, 122 S. Ct. 1843, 1854 (2002). To establish prejudice after having pled guilty, the pleader must show a reasonable probability that he would not have pled, had he received competent advice. *Hill v. Lockhart*, 474 U.S. 52 (1985). In this case, the petitioner has established neither element of *Strickland*.

At trial, Lyons faced near-certain conviction. The defenses that he would have asserted at trial were, in essence, vague hopes for jury nullification. His defense counsel knew, however, that there was a very real hope that he could be sentenced as a juvenile if he pled guilty, because of the sentencing habits of the particular judge in the case. Counsel's performance was not deficient; indeed, the idea for the gamble sprang from defense counsel's superior and intimate knowledge of the court. Lyons's counsel took extra steps to ensure that his client's decision was well informed. He explained extensively the possible consequences of pleading to first degree murder. He arranged for Lyons's father to be involved in the decisionmaking process. The decision to plead was calculated, voluntary, and informed; this is precisely the sort of competent representation that is excluded from the *Strickland* definition of deficient performance. *Strickland*, 466 U.S. at 689-90; *Cone*, 122 S. Ct. at 1854.

As for the prejudice element of *Strickland*, it seems clear that even with knowledge of the possibility of prosecutorial appeal, Lyons would still have pled guilty. Lyons made no attempt to withdraw his guilty plea after the prosecution appealed; rather, he argued his case on the merits before the Court of Appeals. This makes sense: even with the possibility of prosecutorial appeal, the chance

to be sentenced as a juvenile was petitioner's only option short of trial. Lyons wanted a juvenile sentence, not a new trial. Lyons, through counsel, gamed the system and attempted to withdraw his guilty plea only after his juvenile sentence was rejected by the Court of Appeals. The entire point of the post-conviction strategy was to get two bites at the apple; that Lyons now argues he would have given up his first (and *ex ante* more likely) bite because of the possibility of prosecutorial appeal defies credence.

Lyons was very aware of the possible consequences of pleading guilty to first degree murder. Judge Roberson told him, before he pled, that he could possibly be sentenced as an adult, and therefore be subject to a mandatory life sentence, as a result of his guilty plea. That is exactly what happened, after the prosecutorial appeal. Lyons knew the risk, and took his chances. The fact that he did not correctly assess whether or not he actually would be sentenced as an adult is wholly irrelevant. The plea was made voluntarily and with full knowledge of the possible consequences.

Moreover, AEDPA imposes additional constraints on the ability of federal courts to grant a writ of habeas corpus. In order to meet the gatekeeper standards set forth by AEDPA, 28 U.S.C. §§ 2254(d), for the issuance of writs of habeas corpus, the state court adjudication of the claim that is challenged on collateral appeal must have resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Ibid*; *Cone*, 122 S. Ct. at 1850.

The Supreme Court held in *Williams v. Taylor*, 529 U.S. 362 (2000), that "[t]he most important point is that an *unreasonable* application of federal law is different from an

incorrect application of federal law." *Id.* at 410 (emphasis in original). A state-court decision can involve an unreasonable application of United States Supreme Court precedent in only two ways. First, a state court might identify the correct legal rule, but unreasonably apply it to the facts. Second, a state-court decision might unreasonably extend a Supreme Court legal precedent to a new context where it should not apply or unreasonably refuse to extend that principle to a new context where it should apply. *Id.* at 406. The Supreme Court recently reiterated that the *Williams* objective unreasonableness standard applies to the ineffective assistance of counsel setting. *Cone*, 122 S. Ct. at 1850. In *Cone*, the Court held that when a state court correctly identifies the *Strickland* standard as applicable, and makes a reasonable judgment regarding attorney performance and prejudice under the correct standard, a federal court lacks the power to grant a writ of habeas corpus contravening that determination. *Id.* at 1853-54. I would not hold that the Michigan court was objectively unreasonable in its judgment, even were I to disagree with it, as the majority does.

Judge Gilman's concurrence makes a number of interesting points that deserve a brief response. Contrary to the statement at page 21, I had thought that I did note, in the first paragraph of this dissent, and did not dispute the obvious facts in the record, that counsel did not inform their clients of the possibility of a government appeal. All of the counsel involved noted that they did not contemplate that such an appeal could occur or that it would be successful. In the parallel case before us, Miller's counsel, as well as his client, was in court when the prosecutor said that the state would appeal, and specifically testified that he felt that the chances of such an appeal succeeding (one had

never been tried in Michigan, to this point), were sufficiently low that it did not affect their judgment. No. 00-2150, ___ F.3d ___, (6th Cir. 2002).

Judge Gilman's interesting mathematical analysis at page 23 begins to address the correct inquiry, but does not go far enough. The relevant question is whether the ultimate advice was a strategy within the broad bounds of professional competence. Relatedly, we ask whether the decrease in the probability of a successful outcome due to prosecutorial appeal renders credible petitioners' assertions that they would have given up their chance at a juvenile sentence before Judge Roberson. The one counsel who testified specifically thought that the chances of the state succeeding on appeal were fairly small, and we have no basis for discounting that judgment. Thus, if counsel calculated the chances of Judge Roberson's sentencing the defendants as juveniles at 90% (when the reality turned out to be 100%), and believed the chance of success on appeal by the state to be 10%, contingent on the juvenile sentencing below, then the chances of ultimate success would have shrunk from 90% to 81%. This might still look extremely good, as opposed to a very large probability of conviction of first degree murder and a sentence of life without parole.

While my assigning of values is just as speculative as Judge Gilman's, it does emphasize that the proper inquiry for effective assistance of counsel should be the overall strategy employed. It does not appear to me that we can properly say, under the AEDPA standard, that the state courts unreasonably applied *Strickland*.

Finally, I do not agree with Judge Gilman that the failure of the state court to *discuss* the prejudice prong of *Strickland* means that it did not correctly identify and apply *Strickland* as the governing federal rule. But even if we

were to parse the two parts of *Strickland* in this way, we would not conduct a full *de novo* review, but rather a "independent" review as laid out in our recent case of *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000). There, we said, in a similar case: "That independent review, however, is not a full, *de novo* review of the claims, but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA." *Ibid.* Thus, even in conducting an independent review we must determine more than simply that we believe the state court was wrong in its ultimate outcome.

As the above analysis of *Strickland*, *Williams*, and *Cone* shows, we can by no means term the judgment of the Michigan Court of Appeals unreasonable. The judgment is perhaps debatable; if we ignore *Strickland's* clear requirements, we might say it was incorrect; under no circumstances can we say it was unreasonable.

Footnotes

*The Honorable Myron H. Bright, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

[1] Lyons has changed his name legally to James Edwin Lyons, Jr.

[2] The Honorable Denise Page Hood, United States District Court Judge for the Eastern District of Michigan.

[3] The district court ordered that, unless Michigan took action within 120 days to afford Lyons a new trial, Lyons could apply for a writ ordering his forthwith release from custody. The district court did not publish its decision in this case. On the same day the district court granted Lyons' habeas corpus petition, it granted two other petitions in similar cases. The court analyzed all three cases similarly and published only one opinion. *See Haynes v. Burke*, 115 F.Supp.2d 813 (E.D.Mich 2000). The other opinions are unpublished. *See Lyons v. Jackson*, No. 99-CV-70453-DT (E.D. Mich. Aug. 31, 2000); *Miller v. Straub*, No. 98-CV-74655-DT (E.D. Mich. Aug. 31, 2000).

[4] Under Michigan law at that time, the trial court had discretion to determine whether juveniles convicted of first degree murder should be sentenced as juveniles or as adults. *See* Mich. Comp. Laws Ann. §§ 769.1 (1990). The Michigan legislature amended the statute in 1996 to remove this discretion. *See* Mich. Pub. Act 1996 No. 247. All juveniles convicted of first degree murder are now mandatorily sentenced as adults. *See* Mich. Comp. Laws Ann. §§ 769.1(g) (2001).

[5] A 1988 amendment to Michigan statutory law granted Michigan prosecutors an appeal of right from "[a] final judgment or final order of the . . . recorder's court" in criminal cases. Mich. Comp. Laws Ann. §§ 770.12 (as amended, Mich. Pub. Act 1988 No. 66). In November 1989, the Michigan Court of Appeals published a decision in which it construed the amendment to allow prosecutors to appeal criminal sentences as of right. *People v. Reynolds*, 448 N.W.2d 774, 775 (Mich. App. 1989).

[6] *See People v. Haynes*, 527 N.W.2d 512-13 (Mich. 1994) and *People v. Miller*, 527 N.W.2d 513 (Mich. 1994) (ordering that the two juvenile defendants who moved to withdraw their guilty pleas under circumstances similar to those of Lyons be sentenced "forthwith" as adults "without prejudice to subsequent consideration of the motion to withdraw the plea of guilty").

[7] Burgess stated that Lyons' father "didn't really know anything about the law as it related to this situation. It was all new."

[8] The Michigan Court of Appeals handed down its decision reversing imposition of a juvenile sentence and remanding for imposition of an adult sentence on August 3, 1992. On August 18, 1992, Lyons wrote a letter to Chief Judge Roberson requesting new counsel: "My [appellate counsel] never came to see me and never wrote to me. My family and I learned of my sentence being changed in the news paper [sic]."

[9] This denial is contrary to Lyons' admission during his plea colloquy with Chief Judge Roberson in 1990.

[10] Those two appellants, Cortez Miller and Kermit Haynes, also petitioned for writs of habeas corpus in federal district court. In an opinion filed contemporaneously with the instant case, we have affirmed the grant of habeas corpus relief to Miller and Haynes by the district court. *Haynes v. Burke*, ___ F.3d ___ (6th Cir. 2002).

[11] In federal district court, Lyons alleged denial of due process as a second ground for habeas corpus relief. The federal district court, having granted relief based on Lyons' ineffective assistance of counsel claim, did not address the due process argument.

[12] The Supreme Court in *Williams* acknowledged the difficulty in defining the term "unreasonable," but explained that "it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." 529 U.S. at 410. This circuit has stated that we "rely solely on the Supreme Court's decision in *Williams* for the appropriate standard under §§ 2254(d)." *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000); *accord Miller v. Francis*, 269 F.3d 609, 614 & n.1 (6th Cir. 2001). Other circuit courts that have attempted greater clarification have come to widely divergent views on the meaning of "unreasonable." Compare *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000) (stating that an "unreasonable application" requires "[s]ome increment of incorrectness beyond error," but "the increment need not be great; otherwise, habeas relief would be limited to state court decisions 'so far off the mark as to suggest judicial incompetence'") (quoting *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 889 (3d Cir. 1999)); with *Kibbe v. Dubois*, 269 F.3d 26, 36 (1st Cir. 2001) ("[A] state court decision is objectively unreasonable under AEDPA only if it is so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes.") (internal quotation marks removed); and with *Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000) (equating an "unreasonable application" with "clear error," i.e., "a definite and firm conviction that an error has been committed").

[13] The court of appeals recognized that a determination of whether Lyons' guilty plea was made knowingly and voluntarily turned on whether his counsel's advice was "within the range of competence demanded of attorneys in criminal cases." *Haynes (After Remand)*, 562 N.W.2d at 244, 250. This is the equivalent of the performance inquiry in *Strickland*. *See Hill*, 474 U.S. at 56, 58 (equating *Strickland*'s performance inquiry with consideration of whether counsel's advice was "within the range of competence demanded of attorneys in criminal cases"). Because the Michigan Court of Appeals determined Lyons' trial counsel performed adequately, it did not reach the question whether Lyons was prejudiced by deficient performance.

[14] In addition, Burgess entirely failed to consider that an appeals court, faced with the same two radically different sentencing possibilities as Chief Judge Roberson, might well reverse the trial court in favor of the more severe sentence.

[15] Citing the Supreme Court's recent decision in *Bell v. Cone*, 122 S.Ct. 1843 (2002), the dissent states that an attorney's legitimate trial tactics do not constitute deficient performance. A defense counsel's failure to consider a prosecutor's right to appeal is not a tactic or strategy. A defense counsel's failure to inform or advise the defendant regarding the state's right of appeal and the attendant chances of reversal is not a tactic or strategy. Such omissions of legal practice and legal counseling can never be a legitimate defense tactic or strategy.

[16] The warden also argues that Lyons cannot show prejudice because, after learning that the prosecution had appealed the juvenile sentence, Lyons failed to request that

the case be remanded to the trial court so that he could withdraw his plea. A defendant's decision not to abandon the appellate process in an effort to withdraw his guilty plea does not obviate prejudice to the defendant in pleading guilty as the decision to plead had already been made. Moreover, the warden's contention is weakened because the case remained in the appeals court, not the trial court where withdrawal pleas must be made.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DASHAWN LYONS,

Petitioner,

v. **Civil No. 99-CV-70453-DT**
HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

ANDREW JACKSON,

Respondent.

_____/

OPINION AND ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Dashawn Lyons, ("petitioner"), presently confined at the Huron Valley Men's Facility in Ypsilanti, Michigan, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. §§ 2254. In his application, filed through John Minock, petitioner challenges his conviction and sentence on one count of first degree felony murder, M.C.L.A. 750.316; M.S.A. 28.548, and one count of possession of a firearm during the commission of a felony, M.C.L.A. 750.227b; M.S.A. 28.424(2). For the reasons stated below, the petition for writ of habeas corpus is **CONDITIONALLY GRANTED.**

I. BACKGROUND

Petitioner was charged with shooting and killing Douglas Thomas in Detroit, Michigan on November 27, 1989. Although petitioner was sixteen years old at the time of the murder, he was charged as an adult under Michigan's automatic waiver statute. *See* M.C.L.A. 769.1; M.S.A. 28.1072.

On March 30, 1990, petitioner pleaded guilty as charged to first degree murder and felony- firearm in front of Judge Dalton A. Roberson of the Detroit Recorder's Court. Prior to the trial court accepting the plea, petitioner's attorney indicated on the record that his client was a juvenile and that he had discussed the matter extensively with both petitioner and his father. Counsel stated that he felt that it was in petitioner's best interest to plead guilty, believing that he [counsel] would be able to convince the trial court at the time of the disposition hearing to sentence petitioner to the juvenile as opposed to the adult system.

At the time of the plea, the trial court advised petitioner and his father that if he was sentenced as a an adult, he would face a mandatory sentence of life imprisonment without parole. The trial court further explained to petitioner and his father that the trial court could also sentence petitioner as a juvenile and commit him to the juvenile authorities until he was twenty one years old. Petitioner's father indicated on the record that he believed that counsel was acting in his son's best interest.

On November 30, 1990, following a lengthy disposition hearing conducted pursuant to M.C.L.A. 769.1(3); M.S.A. 28.1072(3), petitioner was sentenced as a juvenile by

the trial court and was committed to the Michigan Department of Social Services, to be confined until his twenty first birthday.

The prosecutor appealed the sentence to the Michigan Court of Appeals, which reversed the trial court's sentence and ordered that petitioner be re-sentenced as an adult to life imprisonment without parole. *People v. Lyons,* 195 Mich.App. 248, 489 N.W.2d 218 (1993)(Kelly, J. dissenting). The Michigan Supreme Court vacated this decision based on the ineffective assistance of appellate counsel and remanded the matter to the Michigan Court of Appeals for rebriefing. *People v. Lyons,* 452 Mich. 895; 502 N.W.2d 41 (1993). After re-briefing, the Michigan Court of Appeals again reversed the trial court's sentence and ordered that petitioner be re-sentenced as an adult to life imprisonment without parole. *People v. Lyons,* 203 Mich.App. 465; 513 N.W.2d 170 (1994) (Kelly, J., dissenting); lv. den. 447 Mich. 959; 530 N.W.2d 478 (1994).

Prior to the re-sentencing, petitioner made an oral motion to withdraw his guilty plea. The trial court deferred hearing petitioner's motion to withdraw his guilty plea and sentenced him as an adult, based upon the Michigan Supreme Court's ruling in another case involving juvenile defendants before Judge Roberson. See *People v. Miller,* 447 Mich. 1022; 527 N.W.2d 514 (1994). On January 30, 1995, petitioner was sentenced as an adult to life imprisonment without parole.

An evidentiary hearing was subsequently conducted on petitioner's motion to vacate his guilty plea on April 13, 1995. At the hearing, petitioner's trial counsel, Lawrence Burgess, testified that almost most of his practice involved trials and very few appellate cases. Burgess indicated that his advice to petitioner to plead guilty to first degree murder

was highly unusual and out of the ordinary, but indicated that he advised petitioner to do so because he believed he could persuade the trial court to sentence petitioner as a juvenile. Because of petitioner's age, Burgess believed that petitioner was particularly reliant on his [Burgess'] advice. Because of his concern about petitioner's age at the time of the guilty plea , Burgess involved petitioner's father in the discussions. Because of petitioner's age, Burgess felt that he was placed in the role of being both petitioner's lawyer and a parent.

Burgess denied promising petitioner a particular result if he pleaded guilty. However, Burgess acknowledged that his recommendation to petitioner that he plead guilty to these offenses was "strong." In formulating his advice to petitioner, Burgess acknowledged that he did not consider the fact that the prosecutor could appeal Judge Roberson's decision to sentence petitioner as a juvenile, nor did he discuss this possibility with petitioner. Burgess did not know whether or not it would have made a difference to him had he considered the prosecutor's right to appeal, but testified that petitioner should have been made aware of this risk. In his opinion, Burgess indicated that he was remiss for not informing petitioner about the prosecutor's right to appeal the sentence.

On cross-examination from the prosecutor, Burgess indicated that he thought there might be some defenses to the charges, including self-defense and imperfect self-defense. Burgess indicated that petitioner told him that the victim owed him money. When petitioner went for the man's wallet to take one hundred ($100.00) dollars that the victim owed him, there was a struggle and petitioner got scared and grabbed a gun and fired it. Although acknowledging that under this scenario petitioner might be the initial aggressor, Burgess opined that this still might amount to imperfect self-defense. Although Burgess did not believe that a jury would

view this as felony murder, he felt that there was a risk that they could. Burgess testified that in light of the cases coming out of the Michigan Court of Appeals, he would now discuss the prosecutor's right to appeal with his clients.

Petitioner testified that he was sixteen years old at the time of the guilty plea. At the time of his guilty plea, petitioner was in the seventh grade. Petitioner indicated that he was reluctant to plead guilty and his initial reaction to Burgess' advice was to fight the charges. Petitioner changed his mind when his attorney and his father advised that pleading guilty would be in his best interest. Petitioner did not understand the law of self-defense or the differences between first or second degree murder or manslaughter.

Petitioner believed that the only hurdle he needed to get over was the trial court's sentencing decision. Petitioner did not know that the prosecutor had the right to appeal Judge Roberson's sentence and that the Court of Appeals could reverse the sentence. Had he known that the sentencing judge's decision was not final, petitioner testified that he would have gone to trial.

Petitioner also refuted the factual basis of his guilty plea, indicating that counsel had told him what to say so that the trial court could accept his plea of guilty. In regards to the circumstances surrounding the offense, petitioner claimed that he and Thomas had an argument over money, during which Thomas reached for a gun on the floor. Petitioner managed to get the gun away from Thomas and shot him because he was scared.

On October 24, 1995, the trial court issued an opinion and order permitting petitioner to withdraw his plea of guilty. In so ruling, the trial court noted that trial counsel

had given petitioner extraordinary advice to plead guilty without giving consideration to the prosecutor's appeal rights to noted that advised petitioner to plead guilty without giving consideration to the prosecutor's appeal rights. The trial court also noted that petitioner was sixteen years old and in seventh grade at the time of the proceedings and claimed his innocence to the offense. The trial court found that defense counsel's performance, which suggested promises of leniency or incorrect statements of law, was ineffective because petitioner was never informed that the prosecutor could appeal his sentencing as a juvenile. Finding the plea to have been involuntarily made as the result of counsel's defective performance, the trial court permitted the plea to be withdrawn. *People v. Lyons,* Detroit Recorder's Court # 90-00321, Opinion and Order dated October 24, 1995.

The prosecuting attorney appealed the trial court's decision to the Michigan Court of Appeals. In a consolidated appeal involving several automatically waived juveniles, including petitioner's co-defendant Kermit Haynes, the Michigan Court of Appeals reversed the trial court's decision and re-instated the conviction. In so doing, the Michigan Court of Appeals concluded that trial counsel's failure to inform petitioner that the prosecution could appeal the trial court's decision to sentence petitioner as a juvenile did not constitute ineffective assistance of counsel. *People v. Haynes,* 221 Mich.App. 551, 562 N.W.2d 241; 221 Mich.App. 551, 562 N.W.2d 241 (1997), *lv. den.* 456 Mich. 945, 575 N.W.2d 561 (1998).

Petitioner now seeks the issuance of a writ of habeas corpus on the following ground:

I. PETITIONER'S GUILTY PLEA TO FIRST DEGREE MURDER WAS INVOLUNTARY, UNKNOWING, AND UNINTELLIGENT AS A RESULT OF THE INEFFECTIVE ASSISTANCE OF COUNSEL IN THE TRIAL COURT.

II. PETITIONER WAS DEPRIVED OF DUE PROCESS ON APPEAL AND AT RE-SENTENCING WHERE THE COURT OF APPEALS REFUSED TO CONSIDER EVIDENCE SUBMITTED IN THE TRIAL COURT RECORD DURING THE PENDENCY OF THE APPEAL AND PRECLUDED THE TRIAL COURT FROM CONSIDERING THAT EVIDENCE AT RE-SENTENCING, WHERE THE EVIDENCE, INCLUDING A CHANGE IN FAVOR OF ADULT PUNISHMENT AT THE INITIAL SENTENCING, STRONGLY SUPPORTED JUVENILE SENTENCING INSTEAD.

II. STANDARD OF REVIEW

The provisions of the Antiterrorism and Effective Death Penalty Act "A.E.D.P.A.", Pub.L. No. 104-132, 110 Stat. 1214 (Apr. 26, 1996) govern this case because Petitioner filed his habeas application after the effective date of the AEDPA. *Lindh v. Murphy,* 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). The Act altered the standard of review that a federal court must use when reviewing applications for writs of habeas corpus. 28 U.S.C. §§ 2254(d) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §§ 2254(d); *Harpster v. State of Ohio,* 128 F.3d 322, 326 (6th Cir.1997).

A federal court must apply the presumption of correctness to state court findings of fact for habeas corpus purposes unless convincing evidence is offered to rebut this presumption. 28 U.S.C. §§ 2254(e)(1).

With respect to the "contrary to" clause, there are two situations in which a state court decision will be contrary to clearly established federal law. First, a state court decision

will clearly be contrary to the Supreme Court's clearly established precedent if the state court applies a rule that contradicts the governing law set forth in the Supreme Court's cases. Second, a state-court decision would also be contrary to the Supreme Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from the Supreme Court precedent. *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 1519-1520, 146 L.Ed.2d 389 (2000). On the other hand, a "run-of-the-mill state-court decision" which applied the correct legal rule from the Supreme Court's cases to the facts of a petitioner's cases would not fit comfortably within the "contrary to" clause in §§ 2254(d)(1). *Id.* at 1520. These cases should be reviewed under the "unreasonable application" language of §§ 2254(d)(1).

A federal habeas court making the "unreasonable application" inquiry must ask whether the state court's application of clearly established federal law was objectively unreasonable. *Williams v. Taylor,* 529 U.S. at ----, 120 S.Ct. at 1521. Although the term unreasonable is difficult to define, it is a common term in the legal world, and federal judges are familiar with its meaning. An unreasonable application of federal law is different from an incorrect application of federal law. Thus, a federal habeas court may not issue a writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be unreasonable. *Id.* at 1522.

Finally, the term "clearly established federal law" refers to the holdings as opposed to the dicta of the U.S. Supreme Court's decisions at the time of the relevant state court decisions. *Williams v. Taylor,* 529 U.S. at ----, 120 S.Ct. at 1523. With the AEDPA, Congress limited the source of law for federal habeas relief to cases decided by the U.S. Supreme Court. *Herbert v. Billy,* 160 F.3d 1131, 1135 (6th Cir.1998). However, to the extent that lower or inferior federal courts have decided factually similar cases, references to these decisions by a federal habeas court is appropriate or relevant in determining whether the state court's application of U.S. Supreme Court law was reasonable or unreasonable. *Hull v. Kyler,* 190 F.3d 88, 104 (3rd Cir.1999); *Atley v. Ault,* 191 F.3d 865, 871 (8th Cir.1999); *O'Brien v. Dubois,* 145 F.3d 16, 25 (1st Cir.1998); *Keller v. Larkins,* 89 F.Supp.2d 593, 599 (E.D.Pa.2000); *United States ex. rel. Gooch v. McVicar,* 953 F.Supp. 1001, 1006 (N.D.Ill.1997).

III. DISCUSSION

An ineffective assistance of counsel claim presents a mixed question of law and fact and is subject to *de novo* review. *Combs v. Coyle,* 205 F.3d 269, 278 (6th Cir.2000); *Groseclose v. Bell,* 130 F.3d 1161, 1164 (6th Cir.1997). Because an ineffective assistance of counsel claim is a mixed question of law and fact, it is not subject to the statutory presumption of correctness attending state court findings of fact. *Sims v. Livesay,* 970 F.2d 1575, 1579 (6th Cir.1992).

To show that he or she was denied the effective assistance of counsel under federal constitutional standards, a defendant must demonstrate that, considering all of the circumstances, counsel's performance fell below the objective standard of reasonableness and so prejudiced defendant that

he or she was denied a fair trial and a reasonable probability exists that, but for counsel's conduct, the result would have been different. *Strickland v. Washington,* 466 U.S. 668, 669, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Judicial scrutiny of counsel's performance must be highly deferential. Courts presume that an attorney is competent and the burden rests upon the defendant to show a constitutional violation. *United States v. Pierce,* 62 F.3d 818, 833 (6th Cir.1995). A strong presumption exists that counsel's behavior lies within the wide range of reasonable professional assistance. *O'Hara v. Wigginton,* 24 F.3d 823, 828 (6th Cir.1994). Petitioner must also overcome the presumption that under the circumstances, the challenged action might be sound trial strategy. *Strickland,* 466 U.S. 668 at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674.

In claiming ineffective assistance of counsel in the context of a guilty plea, a defendant must show that his or her counsel's performance was deficient and that the deficient performance caused the defendant to reach a different decision regarding his or her plea of guilty. *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Nagi v. United States,* 90 F.3d 130, 134-135 (6th Cir.1996); *O'Hara v. Wigginton,* 24 F.3d at 828; *Richardson v. Elo,* 974 F.Supp. 1100, 1104 (E.D.Mich.1997) (Gadola, J.). Therefore, to satisfy the 'prejudice' prong of the standard for evaluating ineffective assistance of counsel claims under *Strickland* in the context of a guilty plea, the defendant must show that, but for counsel's errors, he or she would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart,* 474 U.S. at 58-59, 106 S.Ct. 366; *See also Warner v. United States,* 975 F.2d 1207, 1214 (6th Cir.1992) (prejudice is proven if defendant shows a reasonable probability that but for counsel's defective advice, he would not have pleaded guilty).

In the present case, the Michigan Court of Appeals determined that trial counsel was not ineffective for failing to advise petitioner that the prosecutor could appeal any juvenile sentence imposed by the trial court. In so ruling, the Michigan Court of Appeals noted that petitioner was made aware at the time he pleaded guilty to the first degree murder charge that he faced a mandatory sentence of life imprisonment without parole if sentenced as an adult. The Michigan Court of Appeals concluded that petitioner understood the consequences of pleading guilty to first degree murder, but did not move to withdraw his guilty plea and that counsel was not ineffective for failing to advise petitioner that the prosecuting attorney could appeal any juvenile sentence imposed by the court. *People v. Haynes,* 221 Mich.App. at 561-562, 562 N.W.2d 241.

In reviewing this case *de novo,* this Court concludes that the Michigan Court of Appeals' determination that petitioner received effective assistance of counsel when he pleaded guilty was an unreasonable application of the standards enunciated in *Strickland v. Washington and Hill v. Lockhart.* Trial counsel's failure to discuss with petitioner the fact that the prosecutor could appeal the imposition of a juvenile sentence to a higher court and have it overturned amounted to ineffective assistance of counsel and rendered petitioner's plea involuntary.

In *Wogan v. United States,* 846 F.Supp. 135, 140-143 (D.Me.1994), the district court found that defense counsel rendered ineffective assistance of counsel by advising petitioner to waive his right to testify at a sentencing hearing to challenge the amounts of heroin used to score petitioner's

relevant conduct under the federal sentencing guidelines, because counsel failed to inform petitioner that the government could appeal the district court's downward departure sentence and obtain a re-sentencing involving a higher amount of heroin used to determine the relevant conduct for determining petitioner's sentencing guidelines range.

Similarly, in *State v. Goforth,* 130 N.C.App. 603, 503 S.E.2d 676, 678 (N.C.App.1998), the North Carolina Court of Appeals held that a trial counsel's misadvice about the appealability of a defendant's sentence was deficient within the meaning of the first prong of the two-part *Strickland* test. Although *Goforth* involved incorrect advice given by a defense attorney about the defendant's ability to appeal her sentence to a higher court, this Court believes that the holding in that case can be extended to this situation where petitioner's attorney failed to advise petitioner that the Wayne County Prosecutor could appeal any juvenile sentence imposed by the trial court.

Under the circumstances, this Court concludes that counsel's lack of advice on the appealability of petitioner's sentence by the prosecuting attorney amounted to deficient performance within the meaning of the *Strickland* standard for ineffective assistance of counsel.

In reinstating petitioner's conviction, the Michigan Court of Appeals placed great emphasis on the fact that the prosecuting attorney informed the trial court, defense counsel, and petitioner on the record at the disposition hearing that they intended to appeal any juvenile sentence imposed. However, the Michigan Court of Appeals ignored Lusby's testimony that at the time this statement was made, petitioner

expressed concern top him about the prosecutor's expressed intent to appeal any juvenile sentence, but that Lusby downplayed this statement and told him not to worry about it. Lusby also indicated that there was no further discussion, even after petitioner was sentenced as a juvenile, about the prosecutor's right to appeal the sentence imposed. Although the prosecutor may have indicated an intent by his office to appeal any juvenile sentence imposed, petitioner was represented by Mr. Lusby, and not the prosecuting attorney. As Lusby indicated at the evidentiary hearing, petitioner was totally reliant on his advice because of his age. In light of the fact that petitioner's own attorney told him not to worry about any appeal by the prosecutor of any sentence imposed, it would be unreasonable to expect petitioner to move at the time of sentencing to withdraw his plea of guilty.

In reversing the trial court, the Michigan Court of Appeals also ignored petitioner's age and educational level in determining whether his plea had been entered into voluntarily. The determination of whether a defendant's guilty plea was voluntarily and intelligently made must be based upon a comprehensive examination of the totality of the circumstances, rather than any particular record inquiry. *Berry v. Mintzes,* 726 F.2d 1142, 1146 (6th Cir.1984). Because petitioner was sixteen years old and was in the seventh grade when he pleaded guilty, this Court concludes that petitioner's trial counsel had a "particularly stringent duty" to make certain that petitioner understood the charges that he was pleading guilty to, as well as the consequences of the plea. *Rinehart v. Brewer,* 561 F.2d 126, 130 (8th Cir.1977). This would include advising petitioner that under Michigan law, the prosecutor could appeal a juvenile sentence with the very real possibility, as occurred here, that an appellate court would reverse the juvenile disposition leaving the trial court with the sole option of imposing a mandatory sentence of life imprisonment without parole.

This Court agrees with the Detroit Recorder's Court that it was "extraordinary advice" on the part of counsel to recommend to a sixteen year old defendant with a seventh grade education that he plead guilty to an offense for which the sole penalty in the adult criminal justice system would be a nonparolable life sentence. In light of the nature of the adult penalties here, this Court concludes that trial counsel's performance was deficient within the meaning of the *Strickland* standard where he failed to advise petitioner that the prosecutor could appeal a juvenile sentence to a Michigan appellate court with the very real possibility that a higher court would order petitioner resentenced as an adult. Because of petitioner's young age, petitioner was particularly reliant on his attorney's advice to plead guilty to the offenses in this case. In light of what amounted to extraordinary advice by counsel that petitioner plead guilty to an offense which carried a mandatory sentence of life imprisonment without parole, counsel had a duty both to consider and to advise petitioner of the prosecutor's right to appeal any sentence to the Michigan appellate courts, with the possibility that petitioner's juvenile sentence would be overturned on appeal and he would then have to serve a nonparolable life sentence.

This Court concludes that petitioner has demonstrated that his trial counsel was deficient. Petitioner has also satisfied the "prejudice" prong of the *Hill v. Lockhart* standard. Petitioner testified that had he known that the trial court's juvenile sentence was not a final disposition but could be appealed to a higher court, he would not have pleaded guilty. In light of the fact that petitioner pleaded guilty to an offense which normally carries a mandatory nonparolable life sentence, he has shown a reasonable probability that had he

known that the prosecutor could appeal the imposition of a juvenile sentence, thus leaving the trial court with only the severest sentencing option available in the State of Michigan, he would not have pleaded guilty.

This Court determines that because of the ineffective assistance of counsel, petitioner's plea of guilty was not made knowingly or voluntarily. A plea of guilty must be knowingly and voluntarily made. The defendant must be aware of the "relevant circumstances and likely consequences" of his plea. *Hart v. Marion Correctional Institution,* 927 F.2d 256, 257 (6th Cir.1991). Because petitioner was never informed that one of the relevant circumstances of plea of guilty to a first degree murder charge, which was done with the hope of receiving a juvenile sentence, could be the prosecutor appealing such a juvenile sentence, this Court concludes that petitioner's plea of guilty was involuntarily made, particularly in light of petitioner's young age at the time of the plea. The Court will therefore conditionally grant a writ of habeas corpus, ordering the State of Michigan to either take action to afford petitioner a new trial within one hundred and twenty (120) days of the date of this order or release petitioner. *Hart,* 927 F.2d at 259.

Because this Court's conclusion that petitioner is entitled to habeas relief on this first claim is dispositive of the petition, the Court considers it unnecessary to review petitioner's other claim and this Court declines to do so. *See French v. Jones,* 41 F.Supp.2d 726, 735 (E.D.Mich.1999) (Tarnow, J.); *Berrier v. Egeler,* 428 F.Supp. 750, 754 (E.D.Mich.1976) (Feikens, J.).

IV. ORDER

IT IS HEREBY ORDERED THAT PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS IS CONDITIONALLY GRANTED. UNLESS THE STATE TAKES ACTION TO AFFORD PETITIONER A NEW TRIAL WITHIN ONE HUNDRED AND TWENTY (120) DAYS OF THE DATE OF THIS OPINION, HE MAY APPLY FOR A WRIT ORDERING RESPONDENT TO RELEASE HIM FROM CUSTODY FORTHWITH.

_____

HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

Dated: _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DASHAWN LYONS,

Petitioner,

Civil No. 99-CV-70453-DT
v. HONORABLE DENISE PAGE HOOD

ANDREW JACKSON,

Respondent.

_____/

JUDGMENT

This action having come before the Court on a Petition for Writ of Habeas Corpus, and the Court having entered an Opinion and order Granting Petition for Writ of Habeas Corpus,

Accordingly,

Judgment is entered in favor or Petitioner and against Respondent.

DAVID J. WEAVER
CLERK OF COURT

Approved: By:_____
Deputy Clerk

_____

DENISE PAGE HOOD
United States District Judge

Dated:
Detroit, Michigan

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant/Cross-Appellee

FOR PUBLICATION
February 14, 1997
9:15 a.m.

v.

No. 190366
Recorder's Court
LC 90-000321

DESHAUN LYONS, a/k/a DESHAWN LYONS,

Defendant-Appellee/Cross-Appellant.

Before Jansen, P.J. and Sadd and M.D. Schwartz,* JJ.

JANSEN, P.J.

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* Circuit judge, sitting on the Court of Appeals by assignment.

In these consolidated appeals, the Wayne County Prosecutor appeals by leave granted from October 23, 1995, orders of the Detroit Recorder's Court granting these defendants' motions to withdraw their guilty pleas. Defendant Kermit Haynes has also filed a cross appeal. We reverse the trial court's orders granting defendants' motions to withdraw their guilty pleas.

The facts of these cases have been adequately set forth in the prior decisions of this Court and we see no need to reiterate them here. See *People v. Haynes,* 199 Mich.App.

593, 502 N.W.2d 758 (1993); *People v. Miller,* 199 Mich.App. 609, 503 N.W.2d 89 (1993); *People v. Lyons (On Remand),* 203 Mich.App. 465, 513 N.W.2d 170 (1994). However, a full recitation of the procedural history is necessary in order to resolve these appeals. We will address each defendant's appeal separately.

No. 190360

Kermit Eldridge Haynes, born July 8, 1973, was involved in the shooting death of Benjamin Gravel on February 8, 1990. Haynes, along with five other young men, spent that evening attempting to steal a car at gunpoint because they wanted a car to go to a party. Haynes was the one who actually shot and killed Gravel that night. Haynes was charged with first-degree murder, M.C.L. §§ 750.316; M.S.A. §§ 28.548, assault with intent to rob while armed, M.C.L. §§ 750.89; M.S.A. §§ 28.284, and possession of a firearm during the commission of a felony, M.C.L. §§ 750.227b; M.S.A. §§ 28.424(2). He pleaded guilty as charged on March 27, 1990, and the matter was set for a juvenile sentencing hearing before Detroit Recorder's Court Judge Dalton A. Roberson. Following the hearing, Judge Roberson sentenced Haynes as a juvenile and ordered that he be placed with the Michigan Department of Social Services until the age of twenty-one.

The prosecution appealed that ruling, arguing that the trial court abused its discretion in sentencing Haynes as a juvenile. This Court agreed, reversed the trial court's ruling, and remanded with instructions to sentence Haynes as an adult. *Haynes, supra,* p. 594, 502 N.W.2d 758. Haynes sought to appeal to the Supreme Court, but leave was denied on April 8, 1994. 445 Mich. 855, 519 N.W.2d 842 (1994). The case was returned to the trial court and sentencing was scheduled for June 8, 1994. However, on June 8, 1994,

Haynes filed a motion for relief from judgment pursuant to MCR 6.508(D). Haynes later withdrew his motion for relief from judgment and, on July 1, 1994, he filed a motion to withdraw his guilty plea and for an evidentiary hearing. Haynes claimed that he was entitled to withdraw his guilty plea because it was not made voluntarily, knowingly, and understandingly, because he was denied the effective assistance of counsel, and because he was denied due process.

On September 14, 1994, the trial court granted Haynes' motion for an evidentiary hearing. The prosecution sought leave to appeal in this Court, but the Court, White, P.J., and Hood, J. (Corrigan, J., dissenting), denied leave to appeal in an unpublished order entered on November 21, 1994 (Docket No. 178974). The prosecution then sought leave to appeal in the Supreme Court, and the Supreme Court, in lieu of granting leave to appeal, vacated the trial court's order of September 14, 1994, and further directed that Haynes be sentenced as an adult, but without prejudice to subsequent consideration of the motion to withdraw the guilty plea or motions for other relief that Haynes might pursue. 447 Mich. 1021, 527 N.W.2d 512 (1994).

The case was returned to the trial court, and on December 19, 1994, Haynes was sentenced as an adult to the mandatory term of life imprisonment without the possibility of parole for first-degree murder. The trial court then held an evidentiary hearing regarding Haynes' motion to withdraw his guilty plea on April 13, 1995. Following the hearing, the trial court granted Haynes' motion to withdraw his guilty plea. The prosecution applied for leave to appeal, which was granted by this Court on February 1, 1996.

The prosecution contends that the trial court abused its discretion in granting Haynes' motion to withdraw his guilty plea. The trial court applied MCR 6.310(B) (withdrawal of plea before sentence) in deciding the motion. The prosecution contends that the trial court should have applied MCR 6.311 (challenging plea after sentence). We agree with the prosecutor in this regard.

The trial court sentenced Haynes as a juvenile on August 28, 1991. Although the prosecutor has appealed the propriety of sentencing Haynes as a juvenile, Haynes has, at all times during the pendency of these appeals, been under sentence. Further, this Court's first opinion in *Haynes* reversed the trial court's decision to sentence Haynes as a juvenile and remanded for him to be sentenced as an adult. We cannot agree with Haynes' claim that the Supreme Court's order of December 7, 1994, vacated his sentence such that the case is in a presentence posture and MCR 6.310(B) applies. The Supreme Court's order directed that the Recorder's Court order of September 14, 1994 (granting Haynes an evidentiary hearing regarding his motion to withdraw his guilty plea) be vacated. The Supreme Court further directed that Haynes be "sentenced as an adult forthwith, ... but without prejudice to subsequent consideration of the motion to withdraw the plea of guilty or motions for other relief which the defendant might pursue." 447 Mich. at 1021-1022, 527 N.W.2d 512. The Supreme Court's order cannot be read as vacating Haynes' sentence so that the case was placed in a presentence posture when he moved to withdraw his guilty plea.

Based on the procedural history of this case, logic dictates that Haynes moved to withdraw his guilty plea *after* sentencing. Here, the trial court had sentenced Haynes, although as a juvenile, and the appellate issues have all related to the propriety of sentencing him as a juvenile rather

than as an adult. Therefore, we conclude that the trial court erred in applying MCR 6.310(B) to Haynes' motion to withdraw his guilty plea. The proper court rule to apply in this case is MCR 6.311, which controls the challenge of a plea after sentencing and we will apply MCR 6.311 in this case.

After a plea has been accepted by the trial court, there is no absolute right to withdraw the plea. *People v. Eloby (After Remand),* 215 Mich.App. 472, 474, 547 N.W.2d 48 (1996). When a motion to withdraw a plea is made after sentencing, the decision whether to grant it rests within the discretion of the trial court. *Id.,* p. 475, 547 N.W.2d 48. That decision will not be disturbed on appeal unless there is a clear abuse of discretion resulting in a miscarriage of justice. *Id.*

Haynes primarily contends, and the trial court agreed, that he was denied the effective assistance of counsel because trial counsel did not explain to him that the prosecution had the right to appeal his sentence if the trial court decided to sentence him as a juvenile. Thus, Haynes claims that he did not fully understand the ramifications of pleading guilty of first- degree murder because the appellate courts could reverse the trial court's decision and order that he be sentenced as an adult. Therefore, it is Haynes' claim that his plea was not made knowingly, voluntarily, or understandingly.

In reviewing a claim of ineffective assistance of counsel arising out of a guilty plea, the courts should focus on whether the defendant's plea was made voluntarily and understandingly. *In re Oakland Co. Prosecutor,* 191 Mich.App. 113, 120, 477 N.W.2d 455 (1991). Whether a plea is unintelligently made depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases, not on whether counsel's advice

was right or wrong. *Id.*, p. 122, 477 N.W.2d 455. Further, requests to withdraw pleas are generally regarded as frivolous where the circumstances indicate that the defendant's true motivation for moving to withdraw is a concern regarding sentencing. *People v. Holmes,* 181 Mich.App. 488, 492, 449 N.W.2d 917 (1989). Indeed, this Court has stated that counsel's incorrect prediction concerning a defendant's sentence and the prosecutor's role in sentencing is not enough to support a claim of ineffective assistance of counsel. *In re Oakland Co. Prosecutor, supra,* p. 124, 477 N.W.2d 455. More recently, this Court "decline[d] to hold that a guilty plea to first-degree murder is per se proof that [a] defendant received ineffective assistance of counsel." *People v. Effinger,* 212 Mich.App. 67, 71, 536 N.W.2d 809 (1995).

Haynes claims that his counsel did not advise him that the prosecutor had the right to appeal his sentence if he was sentenced as a juvenile. However, the record indicates that Haynes was well aware of the sentencing consequences at the time of the plea hearing. The plea hearing in this case was conducted on March 27, 1990. Defendant's trial counsel, Wilfred Rice, the prosecutor, Marc Hart, Judge Roberson, and defendant were present at the plea hearing, and the following occurred:

> Mr. Rice: Your Honor, for the record, my name is Wilfred C. Rice. I have talked with Mr. Haynes and his family at length about the matter before the court today and it is his desire and with the acquiescence of the father, that he enter a plea of guilty as charged to murder in the first degree and felony firearm, assault with intent to rob being armed.

I have explained to him the possible punishments that are involved in all of the charges before the court, the fact that he could be sentenced as an adult to natural life without parole.

THE COURT: You also explained to him that's the only hope he's got?

MR. RICE: Right.

THE COURT: Because Mr. Hart also indicated, which should put him on formal notice, that he is going to make a recommendation to him as to the other defendant. He wants a day long hearing or there about, for the purpose of trying to convince me that he should be treated as an adult. Does he understand that?

MR. RICE: Yes, I explained that the court has the discretion to consider him for sentencing as an adult or as a juvenile.

THE COURT: If he is sentenced as an adult he has no hope.

MR. RICE: That's right.

THE COURT: Okay.

MR. RICE: That's his understanding.

THE COURT: He wants to take that chance?

MR. RICE: Yes, sir, we want to take that chance.

The Court: Mr. Hart?

MR. HART: Judge, my only concern quite frankly I think that by taking a plea to murder one the defense is setting up the scenario that if you decide to sentence him as an adult and he goes to the adult facility this will get reversed as an ineffective plea.

THE COURT: Why is that?

MR. HART: I don't think you can responsibly plead somebody to first degree murder.

MR. RICE: That's not what the law says. The law says that at an arraignment a defendant can plead to whatever he wants to.

The trial court then proceeded to inform Haynes of the possible punishments for first-degree murder, assault with intent to rob while armed, and felony- firearm. The trial court specifically informed Haynes that first-degree murder is punishable by a mandatory term of life imprisonment and is not parolable. At the plea hearing, Haynes stated that no

one was forcing him to plead guilty, that he was pleading guilty freely, understandingly, and voluntarily, that his counsel had explained to him the possible sentences, that no one promised him that the judge would be lenient, and that he had discussed his guilty plea with his parents. Haynes then established the factual basis for the plea.

Therefore, the record clearly indicates that Haynes was aware that he could be sentenced as an adult to a mandatory term of life imprisonment without the possibility of parole as early as the plea hearing. Yet, knowing that he faced the possibility of being thus sentenced, Haynes still pleaded guilty of first-degree murder and did not move to withdraw his guilty plea until after the appellate process. The record indicates that counsel explained the consequences of pleading guilty of first-degree murder and that defendant's plea was made knowingly, understandingly, and voluntarily. *Effinger, supra,* pp. 70-71, 536 N.W.2d 809.

Moreover, we note that trial counsel's strategy *worked.* Trial counsel advised Haynes to plead guilty, believing that he could convince the trial court to sentence Haynes as a juvenile, which the trial court did. The fact that the appellate courts have ordered that Haynes be sentenced as an adult does not render trial counsel's strategy to constitute ineffective assistance of counsel. Under the circumstances of this case, we decline to hold that trial counsel's failure to inform Haynes that the prosecutor could appeal the trial court's sentencing decision constituted ineffective assistance of counsel.[1]

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[1] We assume for purposes of defendant Haynes' appeal that defense counsel did not inform him that the prosecutor could appeal the trial court's sentencing decision. At the time of the evidentiary hearing, Haynes' trial counsel was

Haynes was fully aware of the consequences of pleading guilty of first-degree murder at the time of the plea hearing.

With regard to the trial court's conclusions that trial counsel's performance suggested promises of leniency or incorrect statements of the law, the record does not support such conclusions. Courts generally will reject assertions that promises of leniency were made where, as here, the defendant has sworn on the record that no such promises were made. *People v. Jackson,* 203 Mich.App. 607, 612, 513 N.W.2d 206 (1994). Further, there is no record support for Haynes' postsentencing allegation that such a promise was made. See *id.*, pp. 612-613, 513 N.W.2d 206. Trial counsel's statements at the plea hearing show that Haynes was informed that by pleading guilty he faced a prison term of life without the possibility of parole. There is simply no indication that trial counsel informed Haynes of incorrect statements of the law or promised leniency, as evidenced by the remarks made at the plea hearing.

Finally, the trial court's conclusion that the plea withdrawal was also supported by Haynes' claim of innocence is wrong. Haynes established the factual basis for the plea in March 1990 and stated on the record that he shot at Gravel. It was not until after the appellate process and five years after tendering his guilty plea that Haynes claimed his innocence

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deceased and could not testify with regard to this matter. Haynes testified that his trial counsel had not informed him that the prosecutor could appeal the trial court's sentencing decision. However, Haynes knew that he faced the possibility of a life without parole sentence at the time that Judge Roberson was to sentence him.

regarding these charges. The timing of Haynes' claim, coupled with the fact that he clearly established a factual basis for the plea in March 1990, certainly indicate that the trial court's finding that his testimony at the hearing where he moved to withdraw the guilty plea supported his claim of innocence is clearly erroneous. Despite its effort to do so, the trial court could not insulate its factual findings from review under the guise of a credibility determination where prior record evidence is directly contrary to Haynes' current claim of "innocence." *Beason v. Beason,* 435 Mich. 791, 804, 460 N.W.2d 207 (1990). Here, in reviewing the entire record and in considering the timing of Haynes' claim, the trial court's finding that Haynes' claim of innocence at the evidentiary hearing supported the motion to withdraw the guilty plea is clearly erroneous because such a claim is implausible. *Id.,* p. 803, 460 N.W.2d 207. Accordingly, we conclude that Haynes' guilty plea was tendered knowingly, understandingly, and voluntarily. There was no error in the plea proceeding to justify setting aside defendant's guilty plea under MCR 6.311. *People v. Montrose (After Remand),* 201 Mich.App. 378, 380, 506 N.W.2d 565 (1993). The trial court clearly abused its discretion in granting defendant's motion to withdraw his guilty plea.

In his cross appeal, Haynes raises the additional issue that the trial court erred in limiting the scope of the evidentiary hearing. Haynes also claims that trial counsel was ineffective in failing to move to suppress his statement to the police. However, these issues are waived for appellate review because of defendant's unconditional guilty plea. *People v. Vonins (After Remand),* 203 Mich.App. 173, 175-176, 511 N.W.2d 706 (1993).

Cortez Miller, born April 4, 1974, was also one of six young men involved in the shooting death of Benjamin Gravel on February 8, 1990. Miller pleaded guilty as charged on March 23, 1990, of first-degree murder, assault with intent to rob while armed, and felony-firearm. Following a juvenile sentencing hearing, Judge Roberson sentenced Miller as a juvenile and ordered that he be placed with the Department of Social Services until the age of twenty-one. The prosecutor appealed Judge Roberson's decision to sentence Miller as a juvenile, and this Court reversed the decision and ordered that the adult sentence be imposed. See *Miller, supra,* p. 610, 503 N.W.2d 89. Miller sought leave to appeal to the Supreme Court and leave was denied on April 8, 1994. 445 Mich. 855, 519 N.W.2d 842 (1994).

Sentencing as an adult in the trial court was set for June 8, 1994, but Miller filed a motion for relief from judgment. Miller later withdrew this motion, but on July 1, 1994, he filed a motion to withdraw his guilty plea. Judge Roberson issued an order granting an evidentiary hearing on September 14, 1994. The prosecution sought leave to appeal to this Court, but leave was denied on November 21, 1994. The prosecutor then sought leave to appeal to the Supreme Court, and the Supreme Court, in lieu of granting leave to appeal, vacated Judge Roberson's order and ordered that Miller be sentenced as an adult "forthwith," but without prejudice to subsequent consideration of the motion to withdraw the guilty plea or motions for other relief. 447 Mich. 1022, 527 N.W.2d 514 (1994). On December 19, 1994, Judge Roberson sentenced Miller as an adult to the mandatory term of life imprisonment without the possibility of parole.

On May 4, 1995, an evidentiary hearing was conducted regarding Miller's motion to withdraw his guilty plea. On October 23, 1995, the trial court granted Miller's motion to withdraw his guilty plea on the basis of ineffective assistance of counsel. The prosecution filed an application for leave to appeal, and this Court granted leave on February 1, 1996.

For the same reasons set forth in Docket No. 190360, we find that the trial court erred in applying MCR 6.310(B). The correct court rule to apply was MCR 6.311 because Miller moved to withdraw his guilty plea after sentencing. The trial court originally sentenced Miller as a juvenile on June 17, 1991, and he has at all times been under sentence since that date. The only issue has been the propriety of sentencing Miller as a juvenile.

Defendant Miller's argument on appeal is the same as Haynes' argument. Miller claims that trial counsel never informed him that the prosecutor had the right to appeal the sentencing decision if the trial court decided to sentence him as a juvenile. Contrary to Miller's argument, we find that he knowingly, understandingly, and voluntarily tendered his plea and that no error occurred in the plea proceeding. Accordingly, the trial court clearly abused its discretion in granting Miller's motion to withdraw his guilty plea.

Defendant, defendant's mother, defendant's trial counsel, Charles Lusby, the prosecutor, Marc Hart, and Judge Roberson were all present at the plea hearing on March 23, 1990. The following occurred:

MR. LUSBY: Your Honor, Mr. Miller would like to withdraw his plea of not guilty to murder in the first degree felony murder, assault with intent to rob being armed and felony firearm and tender a plea of guilty to those charges. There have not been any agreements made with the prosecution. Mr. Hart has said that their office is going to recommend that Mr. Miller be sentenced as an adult. We have not agreed to that. That is his recommendation. He has a right to recommend that.

MR. HART: Could I say something before we start taking the plea?

THE COURT: Sure.

MR. HART: I just want the defendant to be absolutely stone cold aware as to what is going on. He is pleading guilty to first degree murder.

THE COURT: Mandatory life imprisonment, do you understand that?

MR. MILLER: Yes.

THE COURT: The only hope that you got if I am convinced to treat you as a juvenile for the purpose of disposition, do you understand that?

MR. MILLER: Yes, sir.

THE COURT: Okay. Are any of the parents in court?

MR. LUSBY: The mother.

THE COURT: This has been discussed with you?

MRS. MILLER: Yes.

THE COURT: You want him to do this--well, you don't have any choice, but I want you to know.

MRS. MILLER: I understand he has with you that you might do it as a juvenile and you might do it as an adult.

THE COURT: If I do it as an adult he's got no hope.

MRS. MILLER: Right.

THE COURT: Okay.

MR. HART: Moreover let there be no mistake. We are asking that he be sentence[d] as an adult. He is the worse [sic] of the actors in the entire scenario and I intend to offer, I intend to hold a full disposition hearing.

* * * * * *

THE COURT: You want to offer the plea?

MR. LUSBY: Yes your Honor, we are prepared to offer the plea.

The trial court then proceeded to inform Miller of the sentencing consequences for first-degree murder, assault with intent to rob while armed, and felony-firearm. Miller stated that he was pleading guilty freely, understandingly, and voluntarily, and he established the factual basis for the plea. Moreover, at a hearing on February 22, 1991, for the purpose of closing argument the prosecutor made the following remarks while Miller was in the courtroom.

MR. HART: Your Honor, before we get into the substance of the argument, let me just state our position up front and dispel any misunderstanding on what our position on this case is.

On behalf of John D. O'Hair, it is the position of the Wayne County Prosecutor's Office, while there are some circumstances where the mandatory sentencing provisions of the statute might not be appropriate, it is our position that this is not one of those kinds of cases. It is the opinion of the Wayne County Prosecutor's Office that based on the facts and circumstances of this case, justice compels

and demands that this young person be sentenced as an adult and that he be sentenced to life in prison. It is the position of the Wayne County Prosecutor's Office that any sentence less than life in prison would be wholly disproportionate to the seriousness of the crime based on the factual situation and it would be entirely unreasonable in light of this Defendant's part, this Defendant's active participation in the crime.

It is our position that any sentence less than life in prison would be an affront to the integrity of the criminal justice system and an affront to the dignity of Benjamin Gravel and his family, and an affront to the people of this community who rely on the Courts to protect them against marauding, ambushing people who prey upon law-abiding citizens.

In the event that the Court imposes any sentence less than life in prison, it is the opinion of the Wayne County Prosecutor's Office that we will seek immediate review in the higher court to redress what we believe to be the woefully disproportionate leniency of the sentence.

In this case, there can be no doubt that Miller was aware of the sentencing consequences of pleading guilty of first-degree murder. Indeed, in Miller's case, the prosecutor stated on the record in open court that he would appeal if the trial court sentenced Miller to any lesser sentence than as an

adult to life imprisonment without the possibility of parole. Therefore, we conclude that Miller's plea was made knowingly, understandingly, and voluntarily. At the juvenile sentencing hearing, Miller knew that the prosecutor could appeal the sentence, yet he did not move to withdraw his guilty plea until after the appellate process. There is simply no support in the record that Miller did not understand the consequences of pleading guilty of first-degree murder.

The remainder of the trial court's reasons for granting the motion to withdraw the guilty plea are also rejected for essentially the same reasons set forth in Haynes' appeal. There is no record support for Miller's postsentencing allegation that a promise of leniency was made by his counsel. In fact, Lusby testified at the evidentiary hearing that he did not tell Miller that Miller would be sentenced as a juvenile. Rather, Lusby told Miller that his chances were very good that he would be sentenced as a juvenile based on the recommendations of the Department of Social Services, the Probation Department, and the independent psychologist. This advice does not amount to a promise of leniency and does not even constitute bad advice. As noted in Haynes' appeal, counsel's trial strategy in this case worked because Miller was sentenced as a juvenile by the trial court. Therefore, the record does not support the conclusion that Miller was promised leniency by defense counsel or that counsel informed him of incorrect statements of law.

Likewise, Miller's claim of "innocence" is not supported by a review of the entire record. The timing of Miller's claim, some five years after tendering his guilty plea, coupled with the fact that he clearly established a factual basis for the plea, renders his claim of innocence to be implausible.

The trial court's finding that this was merely a credibility determination and that it believed Miller's claim of innocence at the evidentiary hearing is clearly erroneous.

Accordingly, we conclude that Miller's guilty plea was tendered knowingly, voluntarily, and understandingly. There was no error in the plea proceeding to justify setting aside defendant's guilty plea under MCR 6.311. *Montrose, supra,* p. 380, 506 N.W.2d 565. The trial court clearly abused its discretion in granting Miller's motion to withdraw his guilty plea.

Docket No. 190366

Deshawn Lyons (now known as James Edwin Lyons, Jr.), born August 10, 1973, shot and killed Douglas Thomas on November 27, 1989. Lyons pleaded guilty of first-degree murder and felony-firearm. Following a juvenile sentencing hearing, Judge Roberson sentenced Lyons as a juvenile on November 30, 1990. The prosecution appealed that decision, and this Court vacated the sentence and ordered that Lyons be sentenced as an adult. *People v. Lyons,* 195 Mich.App. 248, 489 N.W.2d 218 (1992). In lieu of granting leave to appeal, the Supreme Court vacated this Court's judgment and remanded the case to this Court for reconsideration, finding that Lyons had been denied the effective assistance of appellate counsel. 442 Mich. 895, 502 N.W.2d 41 (1993). On remand, this Court reversed Judge Roberson's decision and remanded for the trial court to sentence Lyons as an adult. *Lyons, supra,* 203 Mich.App. at 467, 513 N.W.2d 170. On September 2, 1994, the Supreme Court denied Lyons leave to appeal. 447 Mich. 959, 530 N.W.2d 478 (1994).

On January 30, 1995, Judge Roberson sentenced Lyons as an adult to the mandatory term of life imprisonment without the possibility of parole. Before being sentenced as an adult, Lyons moved orally to withdraw his guilty plea. On April 5, 1995, Lyons filed a written motion to withdraw his guilty plea. An evidentiary hearing was conducted on April 13, 1995, and, on October 23, 1995, the trial court granted Lyons' motion to withdraw the guilty plea. The prosecution filed an application for leave to appeal, which this Court granted on February 1, 1996.

The parties again dispute whether MCR 6.310(B) or MCR 6.311 applies to this case. For the reasons set forth in Haynes' and Miller's appeals, we find that MCR 6.311 is the correct rule to apply because Lyons was clearly sentenced in this case before he moved to withdraw his guilty plea. Lyons was sentenced on November 30, 1990, as a juvenile. The prior appeals in this case all concern the propriety of sentencing Lyons as a juvenile, and he has at all times been under a sentence. Further, Lyons was sentenced as an adult on January 30, 1995, and it was not until April 5, 1995, that he filed a written motion to withdraw his guilty plea. Accordingly, the trial court erred in applying MCR 6.310(B), and we will apply MCR 6.311.

Lyons pleaded guilty on March 30, 1990. Defendant, defendant's father, defendant's trial counsel, Laurence Burgess, the prosecutor, William Rollstin, and Judge Roberson were all present at the plea hearing. The following colloquy occurred:

> THE COURT: Okay. The defendant was scheduled to go to trial yesterday.

MR. ROLLSTIN: That's correct your Honor it was put over to today because there is another [j]ury trial in Judge Roberts' courtroom.

THE COURT: Counsel?

MR. BURGESS: Larry Burgess appearing on behalf of Mr. Lyons. Judge this is an unusual situation we're about to offer a plea on the first degree murder case.

This as juvenile. I have discussed the matter extensively with both my client who is 16 years old and his father who is present here in the courtroom with him today.

THE COURT: What is the father's name for the record Mr. Burgess?

MR. BURGESS: James Lyons.

* * * * * *

MR. BURGESS: After discussing it with him judge I'm convinced that this is in the best interest that I'm convinced I will be able to at the appropriate time at the disposition hearing in this matter convince this court to place Mr. Lyons into the

juvenile system as opposed to the adult system and on the basis of that he wishes to offer plea of guilty at this time judge.

THE COURT: Okay.

MR. ROLLSTIN: Judge the People are objecting to it. The bottom line is Mr. Lyons right now through Judge Carnovale's courtroom was blind drawn to Judge Roberts' courtroom.

That is where the case currently sits right now. The people are prepared to go to trial.

I have all of my witnesses here and the reason that Mr. Lyons is before you is quit[e] obvious in terms of offering a plea of guilty to your Honor instead of Judge Roberts. I believe that what this constitutes is a form of [sic-- forum] shopping and the People are objecting to Deshawn Lyons pleading guilty to the charge before your Honor.

THE COURT: You can't object to him pleading guilty, I'm the chief judge.

All the cases are mine.

MR. ROLLSTIN: But I think that constitutes a form of [sic--forum] shopping and we object.

THE COURT: I'll take the plea over your objection.

I have no objection to it.

The trial court then proceeded to inform Lyons that there were two sentencing options; he could be sentenced as an adult and spend the rest of his life in prison without the possibility of parole or he could be sentenced as a juvenile until his twenty-first birthday. Lyons' father also indicated on the record that he believed that counsel was acting in the best interest of his son. Defendant Lyons indicated that he was satisfied with the services of counsel and he established a factual basis for the plea.

Once again, the record clearly indicates that Lyons was aware that he could be sentenced as an adult to a mandatory term of life imprisonment without the possibility of parole at the time of the plea hearing. Despite knowing this, Lyons pleaded guilty of first-degree murder and did not move to withdraw the plea until after the appellate process. Therefore, the record indicates that Lyons understood the consequences of pleading guilty of first-degree murder and that his plea was knowingly, understandingly, and voluntarily made.

The remainder of the trial court's reasons for granting the motion to withdraw the guilty plea are also rejected for essentially the same reasons set forth in Haynes' and Miller's appeals. First, there is no record support for Lyons' postsentencing claim that a promise of leniency was made by counsel. At the evidentiary hearing, defense counsel stated

that he did not promise Lyons any particular result. Counsel explained his reason for advising Lyons to plead guilty:

> Well, as I saw his case I saw it as a difficult case in terms of defense and potential danger of being convicted. I knew Judge Roberson for many many years and knew the kind of judge he was and the sentencing policies that he had and his sort of general philosophy in handling not so much these kind of cases but cases in general and handling youths. I believed that I could get a fair hearing from Judge Roberson and I believed that I could persuade him to sentence my client as a juvenile so I advised him to do what he did.

As we have noted in Haynes' and Miller's appeals, counsel's trial strategy worked because Lyons was sentenced as a juvenile by the trial court. Therefore, there is simply nothing in the record supporting the trial court's conclusion that counsel promised leniency or informed defendant of incorrect statements of law.

Similarly, Lyons' claim of "innocence" is not supported by a review of the record. The timing of the claim of innocence, after the appellate process and approximately five years after Lyons tendered his guilty plea, coupled with the fact that he clearly established a factual basis for the plea, renders his claim of innocence at this stage implausible. The trial court's finding that this presented a credibility issue and that it believed Lyons' claim of innocence at the evidentiary hearing is clearly erroneous.

Accordingly, we conclude that Lyons' guilty plea was tendered knowingly, voluntarily, and understandingly. There was no error in the plea proceeding to justify setting aside defendant's guilty plea under MCR 6.311. *Montrose, supra,* p. 380, 506 N.W.2d 565. The trial court clearly abused its discretion in granting Lyons' motion to withdraw his guilty plea.

At this juncture, we note our concern with the arguments raised in these appeals regarding the claims of ineffective assistance of counsel. It is clear from the lower court records that the defendants were well aware of the sentencing consequences they faced when they chose to plead guilty of first- degree murder. It is quite ironic, however, that it was the prosecutors who pointed out to the trial court that it would be irresponsible for defense lawyers to plead their clients guilty of first-degree murder because of the sentencing consequences involved. Yet, at no time did Judge Roberson, the defendants, or the defense lawyers appear to be at all concerned that these young defendants were pleading guilty of crimes for which they faced a mandatory sentence of life imprisonment without the possibility of parole. It is apparent that the trial court's decision at this late stage in the game is nothing more than an attempt to evade the clear dictates of this Court and our Supreme Court that these defendants be sentenced to the adult terms of life imprisonment without the possibility of parole. However harsh that punishment may seem as it applies to juvenile offenders, it is for our Legislature to "provide a broader range of sentencing discretion in cases involving automatic waiver of juveniles." *Haynes, supra,* 445 Mich. 855, 519 N.W.2d 842 (1994) (Boyle, J.).

The trial court's orders granting defendants' motions to withdraw their guilty pleas are reversed. There being no basis to reverse these defendants' convictions or sentences, we emphasize that defendants' convictions and sentences of life imprisonment without the possibility of parole as adult offenders are hereby affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Michael D. Schwartz

(2)

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 2002

No. 02-807

ANDREW JACKSON, Warden

Petitioner,

v

DASHAWN LYONS,

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. **DID THE SIXTH CIRCUIT CORRECTLY AFFIRM THE DISTRICT COURT'S GRANT OF A WRIT ON THE GROUNDS THAT RESPONDENT'S GUILTY PLEA TO FIRST DEGREE MURDER WAS INVOLUNTARY, UNKNOWING, AND UNINTELLIGENT AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE TRIAL COUNSEL ADVISED RESPONDENT TO PLEAD GUILTY TO FIRST DEGREE MURDER BASED UPON COUNSEL'S BELIEF THAT THE JUDGE WOULD SENTENCE RESPONDENT AS A JUVENILE, BUT COMPLETELY FAILED TO CONSIDER THAT THE STATE COULD APPEAL THE SENTENCE?**

II. **DID THE SIXTH CIRCUIT GIVE INSUFFICIENT DEFERENCE TO THE STATE APPELLATE DECISION IN DECIDING THIS CASE?**

III. **SHOULD THIS COURT RECONSIDER ITS DECISION IN WILLIAMS V TAYLOR REGARDING THE DEFINITION OF UNREASONABLE IN THE AEDPA IN ORDER TO PROVIDE GUIDANCE TO LOWER COURTS?**

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ANDREW JACKSON, Warden
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v
DASHAWN LYONS,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

Procedural History

Respondent Dashawn Lyons, then sixteen years of age, was charged with premeditated first degree murder, or felony murder, MCL 750.316, and possession of a firearm in the commission of a felony, MCL 750.227b. On March 30, 1990, he pled guilty as charged on the advice of his lawyer. Because Respondent was under 17 at the time of the offense, the trial court held a statutorily required sentencing hearing to decide whether he should be sentenced as a juvenile or as an adult. After a lengthy hearing held over several months, on November 30, 1990, the trial court sentenced Lyons as a juvenile. The judge issued a written opinion and order, and a five-page Addendum to that opinion on January 10, 1991.

The prosecutor appealed the sentencing by right, and in a 2-1 opinion the Michigan Court of

Appeals reversed and ordered that Lyons be sentenced as an adult to life without parole, Kelly, J., dissenting. *People v Lyons*, 195 Mich App 248 (1992).

Respondent sought leave to appeal from the Michigan Supreme Court. The Michigan Supreme Court first ordered a stay, *People v Lyons*, 498 NW2d 742 (Feb. 26, 1993), and then vacated the Court of Appeals decision and remanded the case for reconsideration because Lyons had been denied the effective assistance of appellate counsel. *People v Lyons,* 422 Mich 895 (1993). The trial court appointed the State Appellate Defender Office to represent Respondent.

After re-briefing, the Michigan Court of Appeals again reversed in a 2-1 opinion, *People v Lyons (On Remand)*, 203 Mich App 465 (1994), Kelly, J., dissenting.

The Michigan Supreme Court denied leave to appeal on September 2, 1994. *People v Lyons*, 447 Mich 959 (1994), Justices Levin and Cavanagh dissenting, and denied Respondent's Motion for Reconsideration on November 30, 1994.

Prior to resentencing on January 30, 1995, Respondent moved to withdraw his guilty plea. The trial court deferred consideration of that motion until an evidentiary hearing could be scheduled, and imposed sentence before hearing the motion to withdraw. [1] An evidentiary hearing was held on April 13, 1995, and on October 24, 1995, the trial court issued an Opinion and Order granting the Motion.

The Michigan Court of Appeals granted leave to the state to appeal that decision and

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[1] The court imposed sentence first because of a recent Supreme Court order in *People v Haynes* and *People v Miller*, 447 Mich 970 (1994). In those cases, involving procedurally similarly situated defendants but in a different case, the Supreme Court had ordered the trial court to impose sentence forthwith, but "***without prejudice to subsequent consideration of the Motion to Withdraw the plea of guilty*** or motions for other relief which the defendant might pursue." (Emphasis added.)

reversed in a published decision. *People v Haynes, et al*, 221 Mich App 551 (1997). The Michigan Supreme Court denied leave to appeal in an order issued March 6, 1998. 456 Mich 945 (1998).

Respondent filed a petition for writ of habeas corpus under 28 USC 2254 in the United States District Court, Eastern District of Michigan. The District Court granted a writ of habeas corpus on August 31, 2000. Respondent appealed, and the Sixth Circuit affirmed, *Lyons v Jackson*, 299 F3d 588 (CA6, 2002), and denied Respondent's Petition for Rehearing and Rehearing *En Banc*, on October 2, 2002.

Facts

This case arose out of a shooting at the home of Douglas Thomas, a crack cocaine dealer. Lyons had been selling cocaine for him. An argument began over money Thomas owed Lyons, and Thomas reached for an automatic weapon. Lyons and Thomas struggled over it and it went off. Thomas was shot five times. There were no other witnesses to the shooting.

At the guilty plea, Lyons' court appointed trial attorney Lawrence Burgess stated that he had given his client the unusual advice to plead guilty to first degree murder because he was convinced he would be able to persuade the Court to sentence him as a juvenile. As the brief factual basis for the plea, Lyons said that he had been selling drugs for Thomas and Thomas owed him money, and he went to Thomas' residence to collect. They argued, Lyons and Thomas struggled over Thomas' gun, and Respondent said he became scared and shot Thomas.

Burgess testified at the evidentiary hearing on Lyons' motion to withdraw his guilty plea. Burgess is a very experienced criminal defense trial lawyer who has handled few appellate cases. He said that his advice to his client to plead guilty to first degree murder was highly unusual, but he made that recommendation, because he believed that he could persuade the trial court to sentence

Lyons as a juvenile. He made the recommendation very strongly, and because of Lyons' youth he was highly reliant on Burgess' advice, so Burgess involved Lyons' father. Burgess characterized his role as like being both Lyon's lawyer and his parent.

Burgess admitted that in advising Lyons to plead guilty he did not take into account the fact that the prosecutor had the right to appeal the sentencing decision (and therefore that the decision of the trial court was not final). It never even entered his mind.

Neither Lyons nor his father knew anything about the law. Burgess believed that there were potential defenses, and that there was a reasonable possibility that a jury would not have convicted of first degree murder. Nonetheless, he advised Lyons to plead guilty as charged, because he believed that the trial court would sentence Lyons as a juvenile. Burgess conceded that Lyons should have been aware of the additional risks in a prosecution appeal of the sentence, and in that respect he believed his performance was remiss.

Lyons testified that at the time of his arrest and plea, he was sixteen years old and was in the seventh grade. He said that he was reluctant to plead guilty and wanted to go to trial, but Burgess and his father persuaded him to enter the plea. He said he did not understand the law of self-defense or the differences between first degree murder, second degree murder, and manslaughter, and was relying on Burgess' advice. He thought the only hurdle he had to get over was the trial court's sentencing decision, and did not know that the prosecutor had the right to appeal the sentence and the Court of Appeals could reverse. He said had he known that the trial judge's sentencing decision was not final, he would have chosen to go to trial.

In its opinion granting the Motion to Withdraw the guilty plea on October 24, 1995, the trial court found that Burgess' performance constituted ineffective assistance of counsel, because he

failed to (1) consider or (2) advise Lyons that the prosecutor could appeal the sentencing decision and the Court of Appeals could reverse the sentence. The trial court additionally found that Lyons' plea was not knowing, intelligent, and voluntary, because (1) given his youth he was highly reliant upon his attorney's advice regarding the result if he pled guilty, and his attorney minimized the risk of an adult prison sentence; and (2) he had a potential defense to the charge of first degree murder and claimed innocence from the elements of the offense, in that he had a claim of self-defense or of mitigation, i.e., he might be guilty of a lesser degree of homicide. The court noted the state did not claim it would be prejudiced if the plea were withdrawn. The court concluded it was in the interest of justice to permit Lyons to withdraw the guilty plea.

The prosecutor appealed and the Michigan Court of Appeals reversed. The Court said the plea was voluntary and that Lyons was not denied the effective assistance of counsel where he was not aware that he was taking a risk beyond the discretion of the trial court on sentencing, because Lyons was aware when he pled guilty that life without parole was a possibility (and therefore it did not matter whether he received that sentence from the trial court or from the Court of Appeals). 221 Mich App, at 572.

In granting a writ of habeas corpus, the District Court found that the Michigan Court of Appeals decision was an unreasonable application of *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed2d 674 (1984) and *Hill v Lockhart*, 474 US 52, 106 S Ct 366, 88 L Ed2d 203 (1985), under *Williams v Taylor*, 529 US 362, 120 S Ct 1495, 146 LEd2d 389 (2000). The Court found that the failure of trial counsel to ***consider and discuss*** with Respondent that the state could appeal a juvenile sentence by right deprived Respondent of the effective assistance of counsel and rendered the guilty plea involuntary. The Court noted that the Michigan Court of Appeals had

ignored Respondent's heavy reliance on his attorney, given his age and educational level, in finding the plea voluntary, particularly when defense counsel rendered such "extraordinary advice" as to plead guilty to first degree murder. The Court also found that Respondent was prejudiced, because Respondent showed a reasonable probability that he would not have pled guilty had he known there was another level of risk in a prosecution appeal.

The Sixth Circuit affirmed, finding that counsel's failure to consider the risk of a state appeal of the sentence and failure to advise Respondent of that risk constituted deficient performance under *Strickland*, and that Respondent was prejudiced under *Hill*, because there was a reasonable probability he would have chosen to go to trial had he been aware that there was a second level of risk beyond the sentencing decision of the trial court.

ARGUMENT

I. RESPONDENT'S GUILTY PLEA TO FIRST DEGREE MURDER WAS INVOLUNTARY, UNKNOWING, AND UNINTELLIGENT AS A RESULT OF THE INEFFECTIVE ASSISTANCE OF COUNSEL.

Respondent maintains the Sixth Circuit was correct in ruling that his guilty plea was not voluntarily, knowingly and understandingly made, because he was denied the effective assistance of counsel. US Const, Ams V, VI, XIV. In its petition, the state attempts to recast the District Court and Sixth Circuit opinions and raises a claim that was not raised until the appeal to the Sixth Circuit. Contrary to the state's claim, the Sixth Circuit decision does not create a "new rule" under the AEDPA, but simply applies *Strickland v Washington* and *Hill v Lockhart*.[2] The state's argument, based primarily upon the dissenting opinion in the Sixth Circuit, is essentially that the Sixth Circuit majority was wrong. It does not merit a writ of *certiorari*.

The state attempts to recast the issue here as merely one of the failure to advise Respondent

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[2] See *Sellan v Kuhlman*, 261 F3d 303, 309 (CA2, 2001), the Court said:

In some circumstances, the question of precisely what law must be "clearly established" for AEDPA purposes may prove to be a complex one. *Cf. Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 254 (2d Cir.2001) (describing the "recurring difficulty" of determining whether a federal right is "clearly established" for qualified immunity purposes). No such complexity exists here. In *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), a post-AEDPA ineffective assistance of counsel case decided after the district court filed its opinion, the Supreme Court concluded: "It is past question that the rule set forth in *Strickland [v. Washington*] qualifies as clearly established law, as determined by the Supreme Court of the United States." Id. at 391, 120 S.Ct. 1495 (Stevens, J., for the Court, Part III) (internal quotation marks omitted). ***The Williams Court thus clarified that for AEDPA purposes, it matters only that the Strickland performance and prejudice test has been "clearly established"--not that a particular theory of ineffective assistance derived from Strickland has been clearly established.*** Any case-specific concerns "obviate neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." Id. (Emphasis added.)

of the state's right to appeal the sentence. However, the principal reason that the courts below found counsel ineffective was for his complete failure to consider, when advising Respondent to plead guilty as charged, that there was the additional risk of a state appeal. The state oversimplifies the rulings below in order to establish a false premise on which to base its new argument.

The state's argument here was not raised in the state courts or in the District Court, but for the first time in the Sixth Circuit. Nor did the Michigan Court of Appeals, the last state court to address the merits, employ this rationale. The state claims (1) that a defendant need only be advised of the direct, as opposed to collateral, consequences of a guilty plea; (2) the prosecutor's right to appeal the sentence in the same case is a collateral consequence; and (3) therefore it cannot have been ineffective for counsel to fail to consider that risk or advise Respondent of it. This argument is without merit.

The Sixth Circuit correctly rejected this argument for the following reasons, at 299 F3d 596-597:

> Relying on a string of circuit court cases, the warden argues that defense counsel's failure to inform Lyons of the prosecution's right to appeal the imposition of a juvenile sentence does not comprise ineffective assistance because the prosecutor's right of appeal represents a collateral, as opposed to a direct, consequence of the plea. We reject this argument on two grounds.
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> First, the warden's reliance on circuit court cases is improper. The AEDPA prohibits use of lower court decisions in determining whether the state court decision is contrary to, or is an unreasonable application of, clearly established federal law. *Williams*, 529 U.S. at 412, 120 S.Ct. 1495 (defining "clearly established law as determined by the Supreme Court" to mean holdings of Supreme Court decisions); *Harris*, 212 F.3d at 944 (holding district court erred in "rely[ing] on authority other than that of the Supreme Court of the United States in its analysis under § 2254(d)").
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> Second, the warden's argument is incompatible with Supreme Court case law. The Court does not use a direct/collateral consequence categorization scheme to decide ineffective assistance of counsel claims. Indeed, in *Hill*, the Supreme Court reviewed

> an Eighth Circuit decision holding that parole eligibility was not a "direct consequence" of a guilty plea. See *Hill v. Lockhart*, 731 F.2d 568, 570-73 (8th Cir.1984). The Court noted this holding, but eschewed any such characterization in favor of directly applying *Strickland* to the plea context. *Hill*, 474 U.S. at 55, 57-60, 106 S.Ct. 366. ***As the Court stated in Williams: "the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims."*** 529 U.S. at 391, 120 S.Ct. 1495. (Emphasis added.)

Assuming, without conceding, that the state's right to appeal the sentence in this case is a collateral rather than direct consequence of the plea, the state's argument still fails. Numerous cases from the lower courts have found counsel ineffective ***even if*** the consequence which counsel fails to consider (or on which counsel offers erroneous advice) is collateral. The cases cited by the state do not provide support for the bright line rule the state asks this Court to adopt.

As the Sixth Circuit noted here, in *Hill v Lockhart, supra*, the Supreme Court decided the case on procedural grounds but declined to reach the merits of Hill's claim that he was denied the effective assistance of counsel for counsel's misadvice that he would be eligible for parole in six years, rather than the actual nine years he was facing. Hill filed a second habeas petition raising that issue, and the Eighth Circuit affirmed the District Court's grant of habeas relief on those grounds, *Hill v Lockhart*, 877 F2d 698, (CA8, 1989). An *en banc* Eighth Circuit affirmed the panel decision. *Hill v Lockhart, en banc*, 894 F2d 1009 (CA8, 1990). Although parole consequences are considered collateral consequences of a guilty plea, and "not every instance of a lawyer's failure to inform a client accurately of parole eligibility will reach the level of a constitutional violation", *Id.* at 894 F2d 1010, Hill nonetheless was granted habeas relief.

Numerous courts have recognized the same principle, that even though parole consequences are "collateral", a defendant may be entitled to habeas relief if counsel provides information which proves to be sufficiently erroneous and defendant can show that he would not have pled guilty in the

absence of the erroneous information. *Meyers v Gillis*, 142 F3d 664, 666 (CA3, 1998); *Sparks v. Sowders*, 852 F2d 882, 885 (CA6,1988); *Czere v Butler*, 833 F2d 59, 63 n. 6 (CA5, 1987); *O'Tuel v Osborne*, 706 F2d 498, 500-01 (CA4, 1983); *Cepulonis v Ponte*, 699 F2d 573, 577 (CA1, 1983); *Strader v Garrison*, 611 F2d 61, 65 (CA4, 1979). So much for the state's argument that the direct/collateral distinction is a bright line rule precluding a finding of ineffective assistance in cases where counsel's error is on a "collateral" consequence.

Two cases cited by the District Court but not even addressed by the state are consistent with this analysis. In *Wogan v United States*, 846 F Supp 135 (D ME, 1994), the District Court found counsel ineffective for failing to inform the defendant that the Government could appeal a downward departure from the Sentencing Guidelines range. *Wogan* is closely analogous to this case, in that counsel's failure to consider the potential consequences of a prosecution appeal by right of the sentence led the defendant to make an uninformed choice. Wogan's uninformed choice was to not testify at his original sentencing hearing on the amount of cocaine attributable to him as relevant conduct under the Guidelines. That choice led to similar consequences as did Lyons' uninformed choice here, a much harsher sentence on remand after the prosecution's successful appeal of the sentence, though the consequences were much crueler for Lyons: life without parole without benefit of a trial in a case where he had defenses of excuse and mitigation.

Also cited by the District Court was *State v Goforth*, 130 NC App 603 (1998), a decision which rests on a line of Fourth Circuit cases. *Goforth* presents a flip side of the issue here: counsel erroneously informed the defendant that after her guilty plea, she could appeal her sentence. The Court noted that North Carolina courts had not previously decided whether erroneous advice concerning the appealability of a sentence could amount to ineffective assistance of counsel, but

upon reviewing several Fourth Circuit cases where erroneous advice had been found to constitute ineffective assistance, the Court concluded that the answer was that such misadvice clearly could be ineffective. The Fourth Circuit cases were *Strader v Garrison*, 611 F2d 61, 65 (CA4, 1979) (misinformation about defendant's parole eligibility; *Ostrander v Green*, 46 F3d 347 (CA4,1995) (misinformation about defendant's eligibility for work release); *United States v Foster*, 68 F3d 86 (CA4, 1995) (misinformation about defendant's sentencing status).

Contrary to the state's argument, a lawyer's mistake about collateral consequences of a guilty plea clearly can amount to ineffective assistance of counsel. Although most of the cases deal with erroneous advice, *Wogan* makes clear what should be obvious, namely that when a lawyer ***fails to consider*** significant consequences in advising a client to plead guilty, he is exercising no more constitutionally effective judgment than the lawyer who gives erroneous advice.

The cases cited by the state regarding the direct/collateral consequence rule are completely beside the point. The state overstates the rule, failing to recognize the cases discussed above. The denial of relief in the cases cited by the state was due in each case to circumstances not comparable to this case. [3] The state's argument for a *per se* rule that the failure of defense counsel to consider

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[3] In *King v Dutton*, 17 F3d 151, 154(CA6, 1994), the defendant was denied relief where he claimed he should have been advised that pleading guilty in one case could have aggravating consequences in sentencing on ***another, unrelated*** case. In *Parry v Rosenmeyer*, 64 F3d 110 (CA3, 1995), the defendant was denied relief where he claimed that his plea was unknowing and involuntary, because he should have been advised that if he were sentenced to probation, his probation could be revoked if he ***later*** violated it and a term of imprisonment substituted in its place. In *United States v Campusano*, 947 F2d 1, (CA1, 1991) the defendant was denied relief on his claim that a state court guilty plea was involuntary because defendant was not aware it could be used against him in a ***subsequent*** federal prosecution. In *United States v Brownlie*, 915 F2d 527 (CA9, 1990), the defendant was denied relief on a claim that he should have been advised that if he committed ***another crime in the future***, the crime to which he pled could be used to enhance the sentence on the future conviction. In *United States v Campbell*, 778 F2d 764 (CA11, 1985), and *United States v Gonzalez*, 202 F3d 20 (CA1, 2000) the defendants were

or to advise Respondent that the state could appeal his sentence cannot possibly constitute ineffective assistance is without merit.

The Sixth Circuit correctly found that counsel was ineffective for failing to even consider the risks in a state appeal of the sentence in advising Respondent to plead guilty, and that as a consequence Respondent did not understand all of the risks he was taking by pleading guilty:

> However, Burgess acted incompetently in failing to consider the likelihood that the prosecutor would exercise his right to appeal the district court's imposition of a juvenile sentence. Any juvenile sentence imposed on Lyons would be less than five years in a juvenile facility. Given such a lenient sentence for first degree murder, it was unreasonable for Burgess not to have considered that the prosecutor could appeal and the juvenile sentence could be reversed. Yet Burgess did not factor this scenario into his advice to Lyons that pleading guilty was in Lyons' best interest.
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> Thus, Lyons did not know that the prosecutor could appeal and that the juvenile sentence could be reversed, and, if so, Lyons would serve a life sentence without possibility of parole. Lyons was left unaware that, even if Burgess's assessment on his chances of receiving a juvenile sentence from Chief Judge Roberson were correct, this was not a one-act play in Chief Judge Roberson's courtroom.
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> Burgess should have considered these possibilities, informed Lyons about them, and incorporated them into his risk assessment when he advised Lyons about pleading guilty. He failed to do so. Rather, he advised Lyons to plead guilty based solely upon his assessment of the relative risks in going to trial versus pleading guilty before Chief Judge Roberson. As a result, Burgess misinformed Lyons regarding the likelihood he would receive an adult sentence. Lyons was not fully apprised of the risks he faced.
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> The duty of defense counsel to consult is paramount when a client has to decide whether or not to waive a constitutional right, such as the right to trial. Because the decision whether or not to plead guilty ultimately rests with the client, see *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) ("the accused has

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denied relief on claims that the failure to advise them of ***deportation*** consequences of their convictions rendered the pleas involuntary. In *Torrey v Estelle*, 842 F2d 234 (CA9, 1988), the defendant was denied relief where he claimed that the state court's failure to advise him at the time he pled guilty that ***he could be resentenced*** under state law if the later state determined that he could not be treated as a juvenile because of bad behavior, like attempting to purchase a gun through the mail while in juvenile custody.

the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"); *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Burger, C.J., concurring) ("[o]nly such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make"), counsel must ensure that the client's decision is as informed as possible. ***Failing even to consider, let alone notify the client of, a factor that could negate the entire benefit of the guilty plea is not within the range of professional norms.***

Lyons' age and his heavy reliance on Burgess, a reliance of which Burgess was aware, enhanced Burgess's duty to make certain that Lyons understood all the risks associated with his guilty plea. Lyons was sixteen years old and had a seventh grade education. His father knew nothing about the applicable law. Burgess acknowledges that he was "placed in the role where [he] was both [Lyons'] lawyer and like a parent advising him." ***This case epitomizes the criminal defendant's need for what the Supreme Court has called the "guiding hand of counsel at every step in the proceeding against him."*** *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

We conclude that Lyons' trial counsel was incompetent. It is an objectively unreasonable application of Hill and Strickland for the Michigan Court of Appeals to hold otherwise. 299 F3d at 598-599. (Footnotes omitted.) (Emphasis added.)

With regard to the prejudice prong of *Strickland*, the Sixth Circuit correctly rejected the state's claim that Respondent was not prejudiced:

The warden argues that Lyons could not have been prejudiced by any deficiency on the part of his trial counsel because Lyons acknowledged at the plea hearing in March 1990 that he could receive an adult sentence of life imprisonment without parole. According to the warden, "the fact that [Lyons] might not have been told that the prosecution could appeal [the juvenile] sentence he was never assured of receiving in the first place should be of no consequence."

The warden maintains that if a defendant is aware of the maximum possible sentence he cannot be prejudiced by his counsel's failure to inform him of the prosecutor's right to appeal. We decline to adopt the warden's argument. ***An awareness of the sentencing range available to the trial judge is not the same as an informed understanding that a sentencing judge's decision is subject to reversal. The rule suggested by the warden would preclude courts from finding prejudice in any situation where the defendant knew the range of penalties to which he was subject.*** 299 F3d 599. (Footnote omitted.) (Emphasis added.)

The Sixth Circuit noted that the circumstances of the case, particularly Respondent's

reluctance to plead guilty until pressured to do so by his attorney, supported a finding that there was a reasonable probability he would not have pled guilty if he had been aware of the additional risk of a state appeal of the sentence. 299 F3d at 600.

This Court should deny the petition for a writ of certiorari.

II. THE SIXTH CIRCUIT DID NOT GIVE THE STATE APPELLATE DECISION INSUFFICIENT DEFERENCE, NOR DID IT DECIDE THIS CASE AS THOUGH IT WERE ON DIRECT REVIEW.

The sole issue in this case is one of ineffective assistance of counsel in circumstances unique because of state law regarding the charging and sentencing of juveniles as adults. The state argues this Court should grant certiorari to refine this Court's jurisprudence regarding the AEDPA on two issues. Neither of those issues are truly present in this case.

The state requests that certiorari be granted so that this Court can give guidance to the lower courts on the degree of deference due a state decision which does not cite controlling federal authority. This issue does not merit certiorari.

In this issue, the state rehashes the dissenting opinion in the Sixth Circuit and attempts to create a tension where one does not really exist. The state claims that the Sixth Circuit did not give adequate deference to the state appellate decision, because the concurring judge noted this was a close case, and by definition a close case cannot be objectively unreasonable. This claim takes language of the concurring opinion out of context and assumes that the concurring judge, a very experienced member of the Sixth Circuit, is unfamiliar with this Court's AEDPA jurisprudence. Judge Gilman, concurring, said:

> I fully concur with the lead opinion's conclusion that Lyons's counsel was constitutionally ineffective because of the lawyer's failure to inform Lyons that the state could appeal the decision of the trial judge to sentence him as a juvenile. My reason for writing separately is to explain, in what I regard as an extremely close case, why I find the well-written dissenting opinion less persuasive than the lead opinion. 299 F3d at 601.

Judge Gilman is familiar with current habeas corpus law. When he said he regarded this as a close case, he clearly meant "close" applying the proper standard of review. This does not lead to

the conclusion the state draws, namely that the Sixth Circuit majority dealt with this case as though it was dealing with a case on direct review. The majority opinion expressly noted that while the state court had not cited *Strickland* or *Hill*, it had applied the law of those cases, and it was applying *Williams v Taylor*:

> Although the Michigan Court of Appeals did not mention either *Hill* or *Strickland* by name, it did apply the law of those cases. Thus, we must examine whether that court applied *Hill* and *Strickland* unreasonably. 299 F3d at 596.

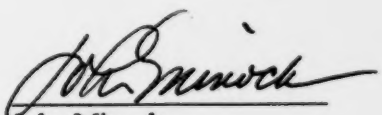
III. THIS COURT DOES NOT NEED TO RECONSIDER WILLIAMS V TAYLOR IN ORDER TO REDEFINE REASONABLENESS UNDER THE AEDPA.

The state argues that *Williams v Taylor* provides an inadequate definition of unreasonableness under the AEDPA and that this Court should revisit *Williams v Taylor* standard and consider adoption of the "any rational jurist" test, which this Court rejected there. Respondent submits there is no reason to do that in this case. This Court does not sit to issue advisory opinions or decide abstract questions not posed by an actual case in controversy. The only controversy posed in this case by the state is the claim that the dissent had the better of the argument. That does not merit certiorari.

SUMMARY AND RELIEF REQUESTED

WHERFORE, Respondent-Appellee Dashawn Lyons requests that this court deny the petition for a writ of certiorari.

Dated: December 27, 2002



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